Jurisdictional Statement

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS,
AND SUSAN R. BENDER as they are the
members of the MASSACHUSETTS
ALCOHOLIC BEVERAGES CONTROL COMMISSION,
and the CAMBRIDGE LICENSE COMMISSION,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Whether a state may within the limits imposed by the Establishment Clause accommodate the diverse interests of its citizens through a zoning statute which shields objecting schools and churches from the disturbances associated with the distribution and consumption of liquor within their immediate vicinity?

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No.

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Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
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JURISDICTIONAL STATEMENT

The Massachusetts Alcoholic Beverages Control Commission (the Commission) and the City of Cambridge License Commission (Cambridge)[1] appeal from the final judgment of an en banc panel of the United States Court of Appeals for the First Circuit holding that Massachusetts General Laws c. 138, §16C violates the Establishment Clause of the First Amendment to the United States Constitution. The Commission and Cambridge jointly file this jurisdictional statement.

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[1] The members of both the state and local agencies were sued individually in

(footnote continued)

OPINIONS BELOW

The United States Court of Appeals for the First Circuit has rendered two

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(footnote continued)

their official capacities. The members of the State Alcoholic Beverages Control Commission are named in the caption. Louis A. Cassis and Susan R. Bender are substituted for Herbert N. Goodwin and Fletcher H. Wiley pursuant to Sup. Ct. R. 40.3. The members of the Cambridge License Commission are Anthony Paolillo, Daniel Reagan, and Mary Colnan.

opinions in this case: the decision of the original panel (Appendix B, pp. 31A-99A) and the decision of the First Circuit sitting en banc (Appendix A, pp. 1A-30A). Neither opinion is yet reported.[2/]

The opinion of the district court is reported at 475 F.Supp. 761 (D.Mass. 1980). The opinion is reprinted in Appendix C at pp. 101A-143A.

JURISDICTION

This is an appeal from a split decision of an en banc panel of the United States Court of Appeals for the First Circuit. The appellee, Grendel's Den,

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[2/] The original panel's opinion shall be referred to as Grendel's I. The en banc opinion shall be referred to as Grendel's II.

Inc. (Grendel's), brought this suit in the district court pursuant to 42 U.S.C. §1983 and 15 U.S.C. §§ 1 and 2. The statutory bases for federal jurisdiction were 28 U.S.C. §§1331 and §1343 and 15 U.S.C. §15.

Grendel's sought a declaration that Massachusetts General Laws c. 138, §16C was unconstitutional on its face and as applied to it. It also sought to have the Commission permanently enjoined from enforcing the statute. The district court found the statute facially invalid as violative of both the Fourteenth Amendment's Due Process Clause and the First Amendment's prohibition against the establishment of religion.

The Court of Appeals in a 2-1 decision reversed. App. 31A. While

Grendel's petition for rehearing was denied, Appendix D, p. 145A, its petition for rehearing en banc was granted on May 18, 1981. Appendix E, p. 149A. Subsequently, the en banc panel, in a 2-1 decision,[3] affirmed the district court's action on the sole ground that the statute violated the Establishment Clause of the First Amendment to the United States Constitution.

Judgment was entered on July 28, 1981. Appendix F, p. 151A. The Commission filed its notice of appeal in the First Circuit on August 11, 1981.

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[3] The original panel included Judge Hoffman of the Eastern District of Virginia. On the rehearing en banc, Circuit Judge Bownes was added. Judge Breyer, the fourth First Circuit judge, did not participate in the en banc decision.

Appendix G, p. 153A. Cambridge's notice of appeal was filed in the First Circuit on August 12, 1981. Appendix H, p. 157A.

The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XXI:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. 2. The transportation or importation into any State, Territory, or possession of the United

> States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

STATUTORY PROVISION INVOLVED

The validity of Massachusetts General Laws c. 138, §16C, is at issue. That provision provides in full as follows:

> Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto; but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from

> the nearest church or school than its former location. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.
>
> In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age.
>
> This secton shall not apply to an extension of licensed premises provided said extension does not exceed fifty feet.

The text of the statute is presently located at page 185 of volume 20, Massachusetts General Laws Annotated (West Publishing Company, 1974).

STATEMENT OF THE CASE

The parties stipulated to the facts in this case. On May 13, 1977, Scorpio's Inc., a holder of an all alcoholic beverages restaurant license, applied to the Cambridge License Commission for approval of the transfer of its license to Grendel's. Notice of the transfer application was duly published in a local newspaper. Also, in accordance with Massachusetts General Laws c. 138, 15A, notice was given to all abutting property owners, and to all schools, hospitals, and churches within a radius of 500 feet from Grendel's. In response to this notice, the Holy Cross Armenian Catholic Parish Church sent a letter of opposition to the City.[4]

Pursuant to Massachusetts General Laws c. 138, §16C, Cambridge denied the transfer. Following this denial, both Grendel's and Scorpio's appealed to the Commission. The Commission held a hearing on September 8, 1977, following which it sustained the denial of the transfer.

Grendel's filed its complaint in district court on November 7, 1977. Grendel's challenged the constitutionality of §16C on the grounds, among others,[5] that the statute (1) improperly delegated legislative authority in violation of the Due Process Clause and (2) violated the Establishment Clause by granting churches a legislative veto over liquor licenses.[6]

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[4] The church stands approximately ten feet from Grendel's premises.

[5] Grendel's also claimed that the statute violated the Equal Protection Clause and the Sherman Antitrust Act, 15 U.S.C. §§1 and 2.

In response to the complaint, the Commission filed a motion to dismiss. In its motion, the Commission asserted that Grendel's had failed to state a claim since the statute did not violate the constitutional provisions and since the state's power under the Twenty-first Amendment to prohibit the sale of liquor near churches and schools included the lesser power to permit such sales upon the consent of the affected institutions. Finally, the Commission argued that the court should abstain, as a matter of comity, from hearing Grendel's claims. Subsequent to the filing of the motion to dismiss, the parties agreed to continue the case pending the Massachusetts Supreme Judicial Court's decision in Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E.2d 1223 (1979), which involved similar issues. Following the Arno decision, which upheld the constitutionality of §16C, the district court, after a hearing, denied the motion to dismiss.

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[6] Grendel's challenge to §16C was both "facial" and "as applied." It alleged that the church had used §16C to advance the commercial interests of its contributors. It also alleged that the church used the provision to coerce contributions from license applicants. By their cross-motions for partial summary judgment, see p. 13 infra, the parties raised the facial, but not the as applied, validity of §16C for decision by the district court. In the event of a reversal of the district court's judgment, the as applied claim remains open for further litigation.

On the basis of the stipulated facts, each party thereafter moved for partial summary judgment. On August 4, 1980, the district court issued its opinion and entered an order granting Grendel's motion. The district court held that §16C violated both the First Amendment and the Due Process Clause of the Fourteenth Amendment. App. 143A.[7] The court rejected the Commission's Twenty-first Amendment argument. App. 118A-120A.[8]

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[7] The court also found that Grendel's was not precluded from pursuing its antitrust claims by the state-action exemption of Parker v. Brown, 317 U.S. 341 (1943). However, the district court determined that §16C did not violate the equal protection clause. Grendel's did not appeal from that determination.

[8] On August 22, 1980, the Commission requested the district court to amend its order by including a certification pursuant to 28 U.S.C. §1292(b) of its

(footnote continued)

The Commission filed its appeal from the district court's action and, on April 7, 1981, the First Circuit Court of Appeals, in a split decision, reversed. Grendel's I, App. 31A. The court held that §16C did not violate the Due Process Clause since it was "a reasonable means of regulation in an area where states have wide latitude to regulate, and [is] not dissimilar to schemes commonly used in the fields of licensing and zoning." App. 63A-64A. The court also held that the statute did not run afoul of the Establishment Clause since "it does not have a 'primary effect of advancing

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(footnote continued)

denial of the Commission's motion to dismiss the antitrust claim. On September 5, 1980, the district court amended its order by certifying the antitrust issue and entered final judgment for Grendel's.

religion' as that phrase has been used in Supreme Court precedents." App. 67A-68A.[9]

Following the First Circuit's decision, Grendel's petition for rehearing _en_ _banc_ was granted. App. 149A. On July 28, 1981, the _en_ _banc_ panel, in a split decision, held §16C to be unconstitutional. _Grendel's II_, App. 1A-30A. Without discussing whether the statute vested any legislative power in religious institutions, the majority of the _en_ _banc_ panel held that the statute provided a benefit to churches which had more than a remote or incidental effect in advancing religion. App. 11A-15A. The majority also held that the statute "distributes its benefits on an explicitly religious basis." (emphasis in original) App. 15A. On these grounds, the majority concluded that "section 16C has a 'primary' or 'principal' effect of advancing religion." App. 21A. Finally, the majority's sole discussion of the Twenty-first Amendment was its comment in a footnote that "the Twenty-first Amendment does nothing to alter our decision in this case." App. 24A n. 11.[10]

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[9] The First Circuit agreed with the district court's antitrust analysis. App. 138A.

The court, at the request of the Commission, stayed its decision pending this appeal.

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[10] The *en banc* panel did not address Grendel's antitrust claims. App. 9A, 24A n 11.

THE QUESTION IS SUBSTANTIAL

I. THIS CASE MERITS PLENARY CONSIDERATION BECAUSE A CONFLICT OF DOCTRINE AND APPLIED LAW HAS ARISEN BETWEEN THE FIRST CIRCUIT COURT OF APPEALS AND THE MASSACHUSETTS SUPREME JUDICIAL COURT.

The en banc panel's majority opinion directly contradicts the decision of the Massachusetts Supreme Judicial Court in Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E.2d 1223 (1979).[11] In Arno, the Supreme Judicial Court upheld the validity of Massachusetts General Laws c. 138, §16C in the face of a similar constitutional challenge. The Supreme Judicial Court, after careful analysis, found that the

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[11] The Arno opinion is reproduced at Appendix I, pp. 153A-186A. All citations to the Arno decision will be to the Northeastern Reporter Second Series.

§16C did not violate either the Due Process Clause of the Fourteenth Amendment or the Establishment Clause of the First Amendment.

Only this Court can resolve the conflict between the Supreme Judicial Court and the First Circuit Court of Appeals. Unless the Court provides a substantive disposition of this appeal, substantial confusion will persist over the constitutionality of §16C. Presently a practical dilemma of law and comity has arisen as to which decision, state or federal, is the controlling precedent in Massachusetts.

Moreover, the conflict between the two courts represents a substantive disagreement over the proper interpretation of the Establishment Clause principles articulated by this Court. Both courts were faced with a facial challenge to the statute. Both courts were guided by the same set of legal principles. Despite this similarity, the courts arrived at opposite conclusions. Such a doctrinal conflict deserves the plenary consideration of this Court. See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).[12/]

II. THE EN BANC OPINION CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

In addition to its incompatibility with the Arno decision, the en banc opinion conflicts with the decisions of

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[12/] It is noteworthy that both the district court and the en banc panel confessed a lack of any clear precedent for their decision to invalidate §16C. Grendel's II, App. 17A; Grendel's Den, Inc., 495 F. Supp. at 766, App. 125A.

other state courts.[13] In Wiles v. Michigan Liquor Control Commission, 59 Mich. App. 321, 229 N.W.2d 434 (1975), the court upheld a statute essentially identical to Massachusetts General Laws c. 138, §16C against an Establishment Clause challenge. Likewise, in Davis v. Town of Wilmer, 376 So.2d 698 (Ala. 1979), the court upheld against an Establishment Clause challenge an ordinance which prohibited the issuance of a license to sell liquor within a

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13/ The First Circuit's view of the state's authority in this area may also conflict with the view of the Fifth Circuit Court of Appeals. The latter court has at least acknowledged that a state's police power encompasses the authority to prohibit the sale of liquor within a given radius of a church. See Sandbach v. City of Valdosta, 526 F.2d 1259 (5th Cir. 1976); Blackman v. City of Big Sandy Texas, 507 F.2d 935 (5th Cir. 1975).

quarter mile of a church, school or other premises licensed to sell alcoholic beverages. Finally, in Horne v. Hernando County, 297 So.2d 606 (Fla. Dist. Ct. App. 1975), the court upheld the constitutionality of an ordinance which prohibited the issuance of a liquor license for premises within 1500 feet of a church or school.

If these courts had used the en banc panel's analysis, each of the statutes reviewed would have been declared unconstitutional. In each of these cases, churches received a benefit similar to the one received under the Massachusetts provision, i.e., the protection afforded by a liquor-free zone. Under the en banc panel's analysis, this benefit would be more than "de minimis," Grendel's II, App. 15A, and would thus violate the

Establishment Clause.

Moreover, these statutes, again like §16C, distribute their benefits to a small class of recipients. Since the statutes do not extend their benefits to "all who are otherwise similarly situated to churches," each would "distribute benefits on an explicitly religious basis," Grendel's II, p. 6, App. 15A, and so violate the First Amendment as "inherently a 'law respecting an establishment of religion.'" Grendel's II, App. 21A.[14]

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[14] The First Circuit attempted to distinguish Horne from this case upon the rationale that churches under the ordinance in that case were "granted no discretionary veto power." Grendel's II, App. 19A, n. 8. However, the *en banc* panel's rationale does not turn on the delegation issue raised by Grendel's. The court explicitly excluded that issue

(footnote continued)

III. THE ISSUES PRESENTED IN THIS APPEAL ARE IMPORTANT NOT ONLY TO MASSACHUSETTS, BUT TO ALL STATES WHICH REGULATE THE DISTRIBUTION OF ALCOHOLIC BEVERAGES.

The en banc panel's decision has national implications.[15] Most states have statutes which, like §16C, protect

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(footnote continued)

from its consideration. App. 9A, 24A n.11. The en banc panel's focus was on the final effects of the statute and whether those effects resulted in a furtherance of religion. Such arguments were presented to and rejected by the state courts in both Horne and Davis.

[15] Judge Campbell, dissenting in Grendel's II, recognized the implications of the majority's opinion and indicated that if the panel's "analysis is to stand, the first amendment must rule out not only the present law but even the most modest laws banning liquor licenses next door to a church. Land use planning would have to ignore churches altogether since such planning would confer a 'valued benefit or power' upon them." Grendel's II, (Campbell, J., dissenting), App. 28A.

religious and educational institutions from the encroachment of liquor establishments by extending them the shelter of a liquor-free zone.[16] A large number of these statutes only extend this "benefit" to schools and

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16/ *See, e.g.,* ALASKA STAT. §0.4.11.410; ARIZ. REV. STAT. ANN. §4-207(A); ARK. STAT. ANN. §48-345; COLO. REV. STAT. §12-47-138; GA. CODE ANN. §58-1029; GUAM CIV. CODE §25208(a); IDAHO CODE §23-913; ILL. REV. STAT. ch. 127, §8 (Smith-Hurd); IND. CODE ANN. §7.1-3-21-111 (Burns); KAN. STAT. ANN. §41-710; KY. REV. STAT. ANN. §243.220 (Baldwin); LA. REV. STAT. ANN. §280 (West); MD. ANN. CODE, ART. 2B §§ 46B, 52A; ME. REV. STAT. ANN. tit. 28, §301; MICH. STAT. ANN. §18.988(1); MO. ANN. STAT. §311.080 (Vernons); MISS. CODE ANN. §67-1-51; MONT. REV. CODES ANN. §16-3-306; NEB. REV. STAT. §53-179; N.J. STAT. ANN. §33:1-76; N.H. REV. STAT. ANN. §177:1; N.M. STAT. ANN. §60-6B-10; N.Y. Alcoholic Beverages Control Law, Art. 8, §105 (Consol.); OKLA. STAT. ANN. tit. 37, §534; R.I. GEN. LAWS §3-7-19; S.C. CODE §61-3-440; UTAH CODE ANN. §16-6-13.5; WASH. REV. CODE ANN. §66.24.010 (9); WIS. STAT. ANN. §176.05(9m) (West).

churches[17] However, none of these staututes, as required by the en banc decision, extend this zone to "all who are otherwise similarly situated to churches." Grendel's II, p. 9, App. 22A-23A.[18] Under the en banc panel's analysis all of these statutes would violate the Establishment Clause.[19] It is therefore important for this Court to review that analysis and to explicate the proper limits of the Establishment Clause in this context.

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[17] See, e.g., the statutes of Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Maine, Maryland, Missouri, Montana, New Jersey, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, and Washington.

[18] The statutes of Guam and Wisconsin include schools, churches and hospitals. The Louisiana and Utah statutes encompass churches, schools and libraries. Mississippi protects churches, schools and funeral homes. In addition to churches and schools, Nebraska and Illinois include in their statutes hospitals, and homes for the aged, for indigents, and for veterans. The Illinois statute also includes naval and military stations. Finally, the Colorado statute applies only to schools.

IV. THE EN BANC PANEL'S OPINION IS INCONSISTENT WITH THIS COURT'S MOST RECENT PRONOUNCEMENT CONCERNING A STATE'S AUTHORITY TO REGULATE THE SALE AND DISTRIBUTION OF LIQUOR WITHIN ITS BOUNDARIES.

More than a month before the en banc panel rendered its decision, this Court issued its opinion in New York Liquor Authority v. Bellanca, __ U.S.____, 101 S.Ct. 2599 (1981)(per curiam), which upheld a state's authority under the

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[19] Nine states, like Massachusetts, permit a waiver of the legislative restriction if the protected institution either gives its assent or does not file an objection to the issuance of the liquor license. See, supra n. 16, the statutes of Arizona, Guam, Kentucky, Maine, Maryland, Michigan, Missouri, New Jersey and Washington.

Twenty-first Amendment to prohibit nude dancing in liquor establishments. The Court reasoned that the "State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." Bellanca, 101 S.Ct. at 2601. Moreover, the Court ruled that the First Amendment did not impede the excercise of legislative authority. Id. The Court's reasoning in Bellanca should have guided the First Circuit in this case. Instead, the court, without any reference to Bellanca, baldly asserted that "the Twenty-first Amendment does nothing to alter our decision in this case." Grendel's II, App. 24A n. 11.

Massachusetts has a legislative policy of protecting individuals attending spiritual, cultural and educational centers from the noise and distractions associated with liquor outlets. See Arno, 384 N.E.2d 1226-1228, App. 171A-178A; Grendel's I, p. 11, App. 55A-56A. In accordance with that policy, the legislature prohibits the issuance of a liquor license to premises located within five hundred feet of an unconsenting school or church. See Arno, 384 N.E.2d. at 1228, App. 178A; Grendel's I, App. 55A.[20] The Massachusetts legislature, acting within its Twenty-first Amendment powers, has determined that, when a pre-existing religious or educational institution objects to the selling of alcoholic beverages within its immediate vicinity, the public interest warrants the prohibition of such sales.[21]

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[20] This condition is simply one of many conditions that the Massachusetts legislature has placed on the issuance of liquor licenses. See Arno, 384 N.E.2d at 1226 n. 5, App. 168A.

Under the great weight of authority, the legislature could, if it had so chosen, have flatly prohibited the sale of liquor within a certain distance of religious or educational institutions. See Grendel's Den, Inc. v. Goodwin, 495 F.Supp. 761, 763 (D. Mass. 1980), App.

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[21] Initially, §16C prohibited without the possibility of waiver the issuance of liquor licenses within 500 feet of a church or school. Arno, 384 N.E. 2d at 1227, App. 171A-172A. In 1968, the legislature amended §16C to permit the issuance of a license when the applicant obtained the written consent of the protected institution. Id. Finally, in 1970, the waiver mechanism was altered to its present form such that the burden of objecting was shifted to the church or school. Id.

109A; California v. LaRue, 409 U.S. 109, 120 (1972)(Stewart, J., concurring).[22] A state having the power to prohibit the sale of intoxicants must necessarily have the power to permit it under prescribed conditions since, as this Court demonstrated in Bellanca, the greater power includes the lesser. New York State Liquor Authority v. Bellanca, 101 S.Ct. at 2601.[23]

The en banc decision effectively disregards the higher authority of the

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[22] See also 45 Am. Jur. 2d, Intoxicating Liquors, §140 (1969).

[23] This is not a case where an individual's fundamental rights are being injured by a state statute. Compare Craig v. Boren, 429 U.S. 190 (1976). Section 16C merely establishes, in a nondiscriminatory fashion, one condition which must be met before a property owner can convert his property into a liquor-serving establishment.

Bellanca decision, and for that reason as well warrants plenary review.

V. BY EXCLUDING ANY PUBLIC PROTECTION OF RELIGIOUS ACTIVITY FROM INCOMPATIBLE CONDUCT ON THE PART OF OTHERS, THE FIRST CIRCUIT HAS EXCEEDED THE DICTATES OF THE ESTABLISHMENT CLAUSE.

This Court has never required an absolute separation of church and state. See Gillette v. United States, 401 U.S. 437, 450 (1971) ("The metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis . . . ."). Some interaction is both necessary and inevitable. The First Amendment's union of the Establishment Clause with the Free Exercise Clause demonstrates the stature of religion within our constitutional framework. See Walz v. Tax Commission, 397 U.S. 664, 668-69 (1970). Rather than seeking to accommodate the Establishment Clause with the coordinate force of the Free Exercise Clause, however, the en banc decision requires the state to ignore the special needs of its religious institutions.

Without even identifying the Establishment Clause interest impaired by the statute, the en banc majority found that §16C had as its primary effect the advancement of religion. The majority based this conclusion on its view that §16C bestowed on churches a more than incidental benefit. Finally, the panel held that the Massachusetts legislature acting under its police power could not enact a zoning statute like

§16C unless the law encompassed "all who are otherwise similarly situated to churches." Grendel's II App. 22A-23A.

A brief review of the major flaws in the majority's analysis indicates that, without support from the decisions of this Court, it has extended the Establishment Clause far beyond its constitutional purpose.

A. The First Circuit's Analysis Omits The Critical Inquiry Whether Section 16C Injures Any Interest Protected By The Establishment Clause.

The en banc panel held that §16C has as its primary effect the advancement of religion.[24] The panel reached this conclusion without explaining how §16C might further any of the evils against which the Establishment Clause protects.[25] These evils consist pri-

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[24] There has never been a question that the statute's purpose was secular in nature. See Grendel's Den, Inc. v. Goodwin, 495 F.Supp. 761, 766-767 (D. Mass. 1980),

(footnote continued)

(footnote continued)

App. 125A-126A. Appellees concede that "the saving secular purpose of Section 16C is to protect diverse centers of spiritual, educational, and cultural enrichment." Appellee's First Circuit brief, p. 13.

[25] Originally, the iniquity against which Grendel's sought protection was a delegation of legislative authority to religious institutions. Its Establishment Clause arguments were a "spinoff" of its Due Process claims. *See Grendel's Den, Inc.*, 495 F.Supp. at 762, App. 103A. However, the *en banc* panel found §16C unconstitutional without addressing the delegation issue. In the absence of any determination that legislative authority has been bestowed upon a religious institution, it is difficult to imagine how, on its face, §16C creates an impermissible relationship between church and state. *See Grendel's II*, (Campbell, J. dissenting), App. 25A. Even the district court recognized that Grendel's Establishment Clause claims were only valid if there was an improper delegation. *See Grendel's Den, Inc.*, 495 F.Supp. at 768, App. 132A.

marily of "sponsorship, financial support port, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). By sheer omission of this fundamental inquiry, the First Circuit failed to see that §16C does not further any such evil. Section 16C does not provide monetary aid to religious institutions. See New York v. Cathedral Academy, 434 U.S. 125 (1977); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). Nor does it place governmental support behind religious dogma or doctrine. See Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); School District of Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421

(1962). Nor does it engender the active involvement of the sovereign in religious activity. See Meek v. Pittenger, 421 U.S. 349, 372 (1975); Lemon v. Kurtzman, 403 U.S. 603, 619 (1971). Finally, the statute does not favor one religion over another.[26]

Section §16C is essentially a zoning statute [27] "designed to protect uses believed to require peace and quiet from more offensive and raucous uses -- among the latter of which historically liquor service stands preeminent." Grendel's II, (Campbell, J., dissenting), App. 26A-2[illegible]A; see also Arno, 384 N.E.2d at 1228-1229, App. 182A. It serves to protect adults and children from the activity and traffic associated with liquor stores and bars while these families and individuals use the church and school facilities as well as while they go to and from such facilities. Through this land-use control mechanism, the Massachusetts legislature seeks to accommodate the diverse needs of its citizenry in an optimal manner. Such a zoning statute does not perpetrate any evil prohibited by the Establishment Clause.[28/] Contrary to the First Circuit's analysis, the Establishment Clause does not require the state to ignore the needs of its religious institutions in land-use planning.[29]

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[26] In his dissenting opinion in Grendel's I, Chief Judge Coffin opined that the provision did in fact discriminate between religions. Thus he postulated: "[w]hether a mosque, marabout, pagoda or tope would qualify is an open question . . . ." App. 93A. This concern was never raised by Grendel's and did not find its way into the en banc opinion. See Grendel's II, App. 17A n. 7.

[27] Arno, 384 N.E.2d at 1226, App. 168A-171A. Grendel's II, (Campbell, J., dissenting) App. 27A-29A. See also Cleary v. Cardullo's, Inc., 347 Mass. 337, 345, 198 N.E.2d 281, 287 (1964); cf. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617, 138 N.E.2d 131, 134 (1956).

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[28] In this regard, §16C can be viewed as a mechanism by which the state seeks to accommodate the Free Exercise Clause interests of its religious institutions. When viewed in this manner, the benefit bestowed on a church by §16C is similar to the benefit which accrues to an individual under a state program which is adjusted to the Free Exercise needs of the individual. See, e.g., Thomas v. Board of the Indiana Employment Security Division, ___ U.S. ___, 101 S.Ct. 1425 (1981). Thus, the benefit bestowed upon a church under §16C "manifests no more than the tension between two religious clauses." Thomas, supra at 1433.

[29] See Zorach v. Clauson, 343 U.S. 306, 313-314 (1952); ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedules of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their

(footnote continued)

The First Circuit's analysis should be tested by its results as well as its logic. This case presents the strongest possible authority for affording protection to churches because it involves the sale of liquor. The Twenty-first Amendment specifically precludes a liquor vendor from claiming an entitlement to sell liquor. Thus, if a state may not prohibit a liquor vendor from conducting his business within the vicinity of a religious institution, how could it proscribe any otherwise lawful activity from

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(footnote continued)

spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups."); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 747 (1976) ("Everson and Allen put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity.").

occurring within such an environment? For example, if a state could not regulate liquor sales in this manner, it certainly could not prohibit pornographic book stores, nude dancing establishments, or massage parlors from the area surrounding churches since each of these activities may claim at least some constitutional protection, a protection not available to the pure commercial interests of a liquor establishment. Compare New York Liquor Authority v. Bellanca, ____U.S. ____, 101 S. Ct. 2599 (1981) with Schaad v. Borough of Mount Ephraim, ____U.S.____, 101 S.Ct. 2176 (1981).[30/]

[30/] The ramifications of the First Circuit's decision on the design of our pluralistic society may be readily seen. Under the court's analysis, a Nevada statute which extends a 400 yard brothel-free zone only to churches and schools would not survive constutional challenge. NEV. REV. STAT. §201.380.

By prohibiting any zone of protection for churches, the First Circuit has opened a gaping hole in the social fabric of American life. The consequences of the First Circuit's analysis thus reveal how far it has expanded the scope of the Establishment Clause and contracted the state's ability to accommodate the special interests of its citizens.

B. The First Circuit Has Diluted The Primary Effect Test To The Point That Any Benefit To Religion Violates The Establishment Clause.

The *en banc* panel abandoned the established principle that the critical issue under the Establishment Clause is whether §16C has the primary effect of advancing religion. *Grendel's II*, App.

10A.[31] Instead, the panel diluted the primary effect test to a simple showing that the effect is more than "de minimis." Grendel's II, App. 15A. The panel held that, since §16C had "some effect in advancing religion," it violated the Establishment Clause on a per se basis. Grendel's II, App. 11A. (emphasis in original). In contrast to the cautious evaluation of the specific degree of benefit exemplified in this Court's precedents, the First Circuit would invalidate statutes under the Establishment Clause upon the showing of any benefit at all. By its adoption of the de minimis standard, the First Circuit has turned the primary effect test on its head.

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[31] In rejecting this standard by which to measure 16C's impact, the en banc panel rejected the precise inquiry articulated by this Court as being central to an Establishment Clause review. Tilton v. Richardson, 403 U.S. 672, 679 (1971):

> The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.

The Court has subsequently noted in the context of aid to schools that a statute would fail the primary effect test if it had "the direct and immediate effect of advancing religion." Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n. 39 (1973). While this formulation leaves open the degree of benefit which would violate the Establishment Clause, it also leaves undisturbed the concrete examples of a permissible degree of benefit afforded by the prior (as well as subsequent) decisions of this Court. See infra at 47-49.

Even under its de minimis standard, the First Circuit "strain[ed] to find an [E]stablishment [C]lause violation." Grendel's II, (Campbell, J, dissenting), App. 25A. While the First Circuit did not precisely define the value of the benefit bestowed, it implied that §16C granted churches a marketable benefit.[32] However, there was no evidence before the panel from which it could have drawn such an inference.[33] While a potential liquor vendor may perceive some commercial value in procuring a liquor license next to a church or school, that value cannot be assumed to inure to the protected institutions.

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[32] See, for example, the court's allusion to the sale of indulgences, App. 12A. While the majority carefully avoided the egregious speculation of the district court on this point, App. 128A-129A, it nonetheless inferred that the benefit bestowed could be expressed in monetary terms.

[33] Since it was faced with a facial challenge to a police power statute, the en banc panel, before it could find §16C unconstitutional, was required to find that §16C in no circumstances could operate validly. See McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). This presumption of validity is strengthened by the Twenty-first Amendment. See New York State Liquor Authority v. Bellanca, ___ U.S. ___, 101 S.Ct. 2599, 2601 (1981).

Contrary to the First Circuit's holding, §16C does not bestow upon churches or schools a "specialized political power." Grendel's II, App. 12A. Section 16C merely permits these institutions to waive an otherwise legitimate restriction on liquor distribution. See generally Arno, 384 N.E.2d at 1225-1228, App. 172A-178A; Grendel's I, App. 53A-55A. Such statutes are not uncommon in the field of zoning and are not considered to be a grant of political power to the protected institutions. Arno, 384 N.E.2d at 1225-1228, App. 174A-175A. In this regard, the First Circuit mischaracterized the nature of §16C, as clarified in the Arno decision, in order to fabricate a benefit to churches.

Section 16C does bestow on churches and schools the benefit of a liquor-free zone. The zone of protection shelters a variety of activities. See, e.g., Walz v. Tax Commission, 397 U.S. at 688 (Brennan, J., concurring) ("[T]he same people who gather in church facilities for religious worship and study may return to these facilities to participate in Boy Scout Activities, to promote anti-poverty causes, to discuss public issues, or to listen to chamber music."). Of course, §16C does serve to make religious activity itself more serene and pleasing to the community. The enhancement of such aesthetic dimensions does not, however, constitute a substantial benefit within the meaning of the Establishment

Clause. Although the Sunday closing laws similarly enhance the serenity of religious activity, they are not deemed to benefit religion in violation of the Establishment Clause. McGowan v. Maryland, 366 U.S. 420 (1961).

The First Circuit's definition of a substantial benefit for purposes of Establishment Clause analysis cannot be reconciled with this Court's precedents. This Court has upheld textbook loan programs for parochial schools,[34] noncategorical grants to church-affiliated colleges for non-sectarian purposes,[35/] property tax exemptions for religious organizations,[36/] the issuance of public bonds to finance construction of non-sectarian facilities by church-affiliated colleges,[37/] public construction grants to church-affiliated colleges for non-sectarian purposes,[38/] restrictions upon commercial activity on Sunday,[39/] the release of public school students

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[34] Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); and Board of Education v. Allen, 392 U.S. 236 (1968).

[35/] Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

[36/] Walz v. Tax Commission, 397 U.S. 664 (1970).

[37/] Hunt v. McNair, 413 U.S. 734 (1973).

[38/] Tilton v. Richardson, 403 U.S. 672 (1971).

[39/] McGowan v. Maryland, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961), during school hours for religious instruction,[40] and public reimbursement of students attending parochial schools for their transportation costs.[41]

If the benefit of a liquor-free zone is sufficient to warrant invalidation of §16C under the Establishment Clause, the more tangible benefits tolerated by this Court may no longer be constitutionally acceptable.[42] In order to maintain the integrity of its primary effect test, the Court should give plenary consideration to the First Circuit's analysis of an impermissible benefit to religion.

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[40] Zorach v. Clauson, 343 U.S. 306 (1952).

[41] Everson v. Board of Education of the Township of Ewig, 330 U.S. 1 (1947).

[42] Indeed, in McGowan v. Maryland, 366 U.S. 420, 424, 445 (1961), and Gallagher v. Crown Kosher Market, 366 U.S. 617, 621 (1961), the Court impliedly condoned laws forbidding certain otherwise allowable Sunday activities within prescribed distances from any church.

C. The Establishment Clause Does Not Invalidate Laws Which Afford Zoning Protection To Churches and Schools But Not To All Other Similarly Situated Institutions.

In an apparent effort to buttress its invalidation of §16C, the First Circuit constructed an additional test to measure the validity of §16C under the Establishment Clause. The First Circuit asserted that, whatever the nature of the benefit afforded by §16C, that benefit was distributed upon an explicitly religious basis. The inclusion of schools did not alter the religious nature of §16C because, in the First Circuit's view, §16C did not "encompass all who are otherwise similarly situated to churches in all respects except dedication to 'divine worship'." Grendel's II, App. 22A-23A. From this premise, the First Circuit reasoned that §16C was "inherently a 'law respecting an establishment of religion'." Grendel's II, App. 21A. Confessing a lack of any Supreme Court precedent for its view (id., App. 17A), the First Circuit instead extended its own holding in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855, 861 (1st Cir. 1980) ("The pivotal factor in determining the constitutionality of tax devices affecting religious institutions or religious education has been the breadth of the affected class."). This view that classifications which include religious institutions, but not "enough" other non-religious institutions, are unconstitutional *per se* represents a radical and unwarranted addition to the Establishment Clause analysis developed by this Court.

The First Circuit distorts *Walz v. Tax Commission* where the Court reviewed the breadth of the challenged tax exemption in order to determine whether it possessed a secular purpose, not whether it had any effect in advancing religion. 397 U.S. at 672-73, 687-689. While the breadth of a legislative classification may shed some light upon its purpose, the First Circuit was bound by Grendel's concession that §16C has a legitimate secular purpose. *Supra*, n. 24. The First Circuit examined the breadth of the legislative classification rather in order to determine whether §16C provided a benefit to religion.[43] The logic of this analysis is, however, flawed. It is the nature of the benefit, not the breadth of the legislative classification, which determines whether the benefit afforded by the legislature advances religion. The proposition that any legislative grant of benefits on an explicitly religious basis violate the Establishment Clause begs the ultimate question, i.e., what is the nature of the benefit.

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[43] This Court has also recognized in the school aid context that the size of the class of beneficiaries is an important factor for determining the potential political divisiveness of a legislative program. See Committee for Public Education v. Nyquist, 413 U.S. 756, 794 (1973). However, the Court left open the question whether this factor would ever have controlling significance. Id. In any case, political divisiveness relates to the question of excessive entanglement. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 765 (1976). Factors demonstrating a potential divisiveness do not, therefore, necessarily show a benefit to religion. "[E]ntanglement is essentially a procedural problem. . . ." Roemer, 426 U.S. at 755. It concerns the form of the interaction between church and state. What constitutes a benefit remains a separate fact-based inquiry.

In any case, the First Circuit's characterization of §16C as operating along religious lines exceeds the proper scope of judicial review under the Establishment Clause. On the basis of its view that §16C fails to encompass other institutions besides schools which are similar to churches in all relevant respects, the First Circuit concluded that this legislative omission confirmed the religious nature of the zoning classification. This holding violates several canons of constitutional adjudication. First, the legislative rather than the judicial branch bears the primary responsibility for determining which institutions are so similarly situated as to warrant similar treatment. See McGowan v. Maryland, 366 U.S. 420, 426 n. 3 (1961), citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).[44] Second, the record in this case does not provide a sound evidentiary basis for determining what, if any, other institutions are similarly situated in all relevant respects. The parties best equipped to present such evidence, i.e., those institutions which might claim to be similarly situated, are not before the Court. The only party before the Court, Grendel's, lacks standing to prosecute whatever rights those similarly situated institutions might have. See McGowan v. Maryland, 366 U.S. 420, 429 (1961). The standing requirement serves to ensure an adequate record for adjudication as well as to avoid unnecessary adjudication. Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). Under these circumstances, the question whether the omission of similarly situated institutions violates the Establishment Clause remains too hypothetical for judicial resolution. See generally Warth v. Seldin, 422 U.S. 490, 499-502 (1975). The presumption that legislative enactments are valid precludes the speculative invalidity on which the First Circuit rested its judgment. New York State Liquor Authority v. Bellanca, ____U.S. _____, 101 S.Ct. 2599, 2601 (1981); Williamson v. Lee Optical Co., 348 U.S. at 489 (1955); see also Minnesota v. Clover Leaf Creamery Co., _____U.S.____, 101 S.Ct. 715, 723-724 (1981). Finally, by virtue of, its express inclusion of schools, §16C cannot be said to distribute benefits on an explicitly religious basis.

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[44] Accord, Grendel's II, (Campbell, J., dissenting), App. 29A-30A.

The First Circuit's theory of underinclusive religious classifications thus distorts this Court's precedents as well as undermines the fundamental restraints upon judicial review. Plenary consideration is thus appropriate to correct these errors.

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction of this appeal and set the case for argument. In addition, the Court may wish to consider summary reversal.

Respectfully submitted,

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Appendix

I

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81-878

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS,
AND SUSAN R. BENDER as they are the
members of the MASSACHUSETTS
ALCOHOLIC BEVERAGES CONTROL COMMISSION,
and the CAMBRIDGE LICENSE COMMISSION,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO APPELLANTS' JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
PLAINTIFF, APPELLEE,
v.
HERBERT N. GOODWIN, ET AL.,
DEFENDANTS, APPELLEES.

CAMBRIDGE LICENSE COMMISSION, ET AL.
DEFENDANTS, APPELLANTS.

No. 80-1654

GRENDEL'S DEN, INC.,
PLAINTIFF, APPELLEE,
v.
HERBERT N. GOODWIN, ET AL.,
DEFENDANTS, APPELLANTS.

ON PETITION FOR REHEARING EN BANC
[495 F. Supp. 761]

Before Coffin, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges.*

July 28, 1981

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*Judge Breyer did not participate in the decision of this case.

Gerald J. Caruso, Assistant Attorney General, and Birge Albright, with whom Francis X. Bellotti, Attorney General, and Thomas Miller, Assistant Attorney General, were on brief, for appellants.

John Reinstein, Harvey A. Silvergate, and Mark A. Michelson on brief for Civil Liberties Union of Massachusetts, Amicus Curiae.

Laurence H. Tribe, with whom David Rosenberg, and Ira Karasick, were on brief, for appellee.

COFFIN, Chief Judge. In this appeal, now being considered en banc, we determine whether a state, consistent with the establishment clause, may provide that premises shall not be licensed for the sale of liquor if a nearby church - defined as "a church or synagogue building dedicated to divine worship" - or school objects.

Appellee is a restaurant located in the Harvard Square area, a well-known business and entertainment center in Cambridge, Massachusetts. The Holy Cross Armenian Catholic Parish is located adjacent to appellee. In 1977, appellee, pursuant to a purchase agreement, applied to the Cambridge License Commission (CLC) for approval of an alcoholic beverage license. In Harvard Square and within 500 feet of the Holy Cross Church there are at least 26 premises licensed to sell liquor. Nonetheless Holy Cross objected to appellee's application. The CLC voted to deny the application, citing only Holy Cross's objection and noting that the church "is within 10 feet of the proposed location."

Appellee appealed this denial to the Massachusetts Alcoholic Beverages Control Commission (ABCC). After hearing, the ABCC upheld the CLC's action.

> "on the grounds that the governing board of the church objected . . . under the provisions of Chapter 138, Section 16C, and this represents an absolute veto. [The ABCC] find[s] that the church's objection under Section 16C was the only basis on which the transfer was denied."

We state the text of section 16C in the margin.[1/]

[1/] "§16C. Licenses for premises near churches or schools

Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above

(footnote continued)

In late 1977, appellee brought suit in federal district court against the CLC

(footnote continued)

street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto, but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its fromer location. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.

In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age.

This section shall not apply to an extension of licensed premises provided said extension does not exceed fifty feet."

and the members of the CLC and the ABCC in their official capacities. Appellee sought relief on four theories: that section 16C "on its face and as applied" violated the equal protection and due process guarantees, the establishment clause of the First Amendment, and the Sherman Act.[2] The appellants moved both that the court abstain and that it dismiss the complaint for failure to state a claim. After a voluntary continuance of the suit pending decision by the Massachusetts Supreme Judicial Court in Arno v. Alcoholic Beverages Control Commission, Mass. , 284 [sic] N.E.2d 1223 (1979), a case that ultimately upheld section 16C against due process and establishment clause challenges, the district court denied the appellants' motion to dismiss. The litigants then stipulated to facts and moved for summary judgment on all counts except the "question of whether or not the church in fact exercised its power under . . .§16A [sic] in an arbitrary or otherwise discriminatory manner" (emphasis added).

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[2] The complaint asserted federal jurisdiction under 15 U.S.C. §115 [sic] and 28 U.S.C. §§1331 & 1343.

The district court first ruled that the state's powers under the Twenty-first Amendment, which prohibits the importation of liquor into states in violation of their laws, cannot displace other constitutional guarantees. It then held that section 16C is a delegation of legislative power violating due process, as well as a law respecting an establishment of religion violating the First Amendment. It rejected appellee's equal protection arguments, but held that the state's actions were not immune from antitrust review under the doctrine of Parker v. Brown, 317 U.S. 341 (1942). The court consequently declared section 16C void in violation of the First and Fourteenth Amendments. Grendel's Den, Inc. v. Goodwin, 495 F.Supp. 761 (D. Mass. 1980). It certified this judgment, together with its denial of the appellants' motion to dismiss under Parker v. Brown, pursuant to 28 U.S.C. §1292. We consented to hear the appeal.

The original panel in this case, in a split opinion, reversed the district court's due process and establishment of religion judgments, but upheld its antitrust analysis. *Grendel's Den, Inc. v. Goodwin*, Nos. 80-1653 and 80-1654 (April 7, 1981). Appellees petitioned for rehearing, which we denied, and for rehearing *en banc*, which we granted. We now conclude that the statute offends the establishment clause of the First Amendment. We do not reach the due process or antitrust claims.

As the Supreme Court has often announced, a statute does not offend the establishment clause so long as it has a secular purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion. *E.g.*, *Committee for Public Education v. Regan*, 444 U.S. 646, 653 (1980). Appellee does not contend that section 16C has other than a secular purpose. We thus pass to the second step of deciding whether section 16C has an effect respecting the advancement of religion that can be described as "principal" or "primary".

A literal reading, without references to cases, of "principal" and "primary" might suggest that the question is whether the chief or dominant effect of section 16C's impact is the promotion of religion as opposed to some secular effect. We are instructed, however, that we need not attempt any such "metaphysical" "ultimate judgment". Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n.39 (1973). Rather the relevant question is whether the law "has the direct and immediate effect of advancing religion" as contrasted with "only a remote and incidental effect advantageous to religious institutions." Id. (emphasis added).[3] See also Meek v. Pittenger, 421 U.S. 349, 364-65 (1975); Sloan v. Lemon, 413 U.S. 825, 832 (1973).

There is no doubt that section 16C has some effect in advancing religion in that it confers upon churches a valued benefit or power. Looking to the substance of the law in question, see, e.g., Sloan v. Lemon, 413 U.S. at 832, section 16C permits Massachusetts churches to determine conclusively whether new premises in their area will be allowed to sell alcoholic beverages. See Baser v. Spaulding, ___ Mass. App. Ct. , , 386 N.E.2d 1306, 1307 (1979). It is true -- whether or not one contemplates that a church and its neighbors may bargain over the sale of such an indulgence -- that this grant of specialized political power is not direct state fiscal aid to religion. Precedents show, however, that the establishment clause's strictures are not confined to the context of cash supports to religion.[4]

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[3] Indeed, the Court has gone so far as to say that statutes will not survive this scrutiny should there be the "mere possibility" that state assistance "might 'in part have the effect of advancing religion.'" Committee for Public Education v. Nyquist, 413 U.S. 756 784 n.39 (1973) (emphasis in original) (quoting Tilton v. Richardson, 403 U.S. 672, 683 (1971)).

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[4] E.g., Epperson v. Arkansas, 393 U.S. 97, 106 (1968) ("anti-evolution" statute) ("the Frist Amendment does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma"); School District of Abington v. Schempp, 374 U.S. 203 (1963) (school Bible readings); Engle v. Vitale,

(footnote continued)

The extent of the benefit at issue, moreover, is substantial. This benefit is the grant of a veto power over liquor sales in roughly one million square feet (the area of a circle of 500 feet radius from a church's property lines) of what may be a city's most commercially valuable sites. The statute simply requires that the church "object[]". Leaving aside the considerable due process issues of the lack of standards and the absence of any requirement of reasoned decision,[5] we note that the law vests

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(footnote continued)

370 U.S. 421, 431 (1962) (official school prayers) (proscribing governmental "power" and "presige" as well as "financial support" in favor of religion).

[5] It is no more satisfactory to say that churches can be relied upon not to violate some public trust inherent in this standardless grant of authority

(footnote continued)

every church with a power to give or deny to an establishment a privilege, the absence of which may threaten the viability of the enterprise and the presence of which may substantially enhance its profitability. Looking at this non-generalized grant to churches of a right of absolute discretion to confer or withhold an important commercial privilege in a teeming business and entertainment area in addition to their non-widely shared right to be free from the noise and distrubance attending nearby liquor sales, we are unable to say that this grant has only a "remote and incidental

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(footnote continued)

than it would have been to say in Lemon v. Kurtzman that churches can be trusted not to spend public monies for secular courses. See 403 U.S. 602, 618-19 (1971).

effect advantageous to religious institutions." Nyquist, 413 U.S. at 784 n.30. The effect would perhaps be more striking if the churches' veto power were to extend to any place of business within 500 feet, but, we think, no more offensive to the establishment clause. The singling out of the liquor-selling segment of the business and entertainment community is not de minimis.

We need not however, rely solely on these factors since section 16C contains a further and highly pertinent feature. The law distributes benefits on an explicitly religious basis. We are of course aware that, if possible, statutes are to be construed to avoid constitutional defects. But no reasonable reading by us of "church", when expressly defined as "a church or synagogue building dedicated to divine worship", can transform section 16C into a religiously neutral law. We face here a state law. Massachusetts' highest court recently read this law in a First Amendment context and found no special content or limitation apart from the ordinary meaning of the words employed.[6] Arno v. Alcoholic Beverages Control Commission, ___ Mass. ___-___, 384 N.E. 2d 1223, 1228-29 (1979). See also Samel v. City of Pittsfield Licensing, Board, ___ Mass. , 384 N.E.2d 1230 (1979).

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[6] The district court and the parties abstained from prosecuting the instant action for two years in anticipation of the decision in Arno. Since there can be no reasonable uncertainty about the meaning of the relevant language in section 16C after the Arno decision, there is no justification for the further abstention that appellants urge. See, e.g., Druker v. Sullivan, 458 F.2d 1272, 1274 (1st Cir. 1972).

We consequently are forced to the conclusion that section 16C's language at the very least distinguishes between religious and nonreligious groups by granting significant rights to the former that it withholds from the latter.[7]

Although laws containing explicit religious discrimination apparently have been too rare to appear for constitutional review in the Supreme Court,[8] there are many cases that lay down reliable guidelines. The landmark decision in

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[7] Since our conclusion does not demand it, we refrain from deciding whether section 16C's use of the word "divine" inescapably means that this law also discriminates _between_ religions. _But see_ _Torcaso v. Watkins_, 367 U.S. 488, 495 & n. 11 (1961).

[8] Appellants cite a number of cases in which laws have been upheld against establishment clause attack. None involve

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statutes with facially religious classifications. For instance, in Walz v. Tax Commission, 397 U.S. 664 (1970), the Court did uphold a New York statute that exempted from taxation property used for "religous, bible," and "missionary" purposes together with property used for "moral or mental improvement", "tract, charitable, benevolent, missionary, hospital, infirmary,educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetary purporses". id. at 667 n.1. Yet central to the court's reasoning was the fact that New York "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of worship within a broad class of property owned by nonprofit, quasi-public corporations". Id. at 673. See also id. at 697-70 & n.1 (opinion of Harlan, J.). Similarly, the Sunday closing laws reviewed in McGowan v. Maryland, 366 U.S. 420, 453-59 (1961), were by their terms applicable to all citizens. See also, e.g., Everson v. Board of Education, 330 U.S. 1, 3 n.1 (1947) (permitting school boards to make transportation contracts for all "children living remote from any schoolhouse").

(footnote continued)

Everson v. Board of Education recited that states "cannot exclude individual

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Compare Welsh v. United States, 398 U.S. 333 (1970) (apparent religious discrimination in federal conscientious objector law construed to the contrary by four members, with fifth vote concurring in the result based on statute's violation of the establishment clause).

Appellants also point to two state decisions that upheld liquor laws involving churches against constitutional attack. In Horne v. Hernando County, 297 So. 2d 606 (Fla. Dist. Ct. App. 1974), the statute differed from the present section 16C in that it barred all new alcohol sales within 1500 feet of an established church or school. Churches thus were granted no discretionary veto power. Nor were they defined in that case as limited to houses of "divine worship". Similarly, "church" was left undefined in Wiles v. Michigan Liquor Control Commission, 59 Mich. App. 321, 229 N.W.2d 434 (1975), although the statute there did give churches a veto power. In addition to these distinctions, we observe that the establishment clause analysis in each case was cursory. See also California v. Larue [sic], 409 U.S. 109, 120 (1972) (Stewart, J., concurring).

Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. 1, 16 (1947) (emphasis in original). A few months ago the court reiterated this language. Thomas v. Review Board, 49 U.S.L.W. 4341, 4344 (April 6, 1981). The Everson court also made clear that states may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U.S. at 15. This direction also has been quoted frequently when First Amendment fundamentals are reviewed. E.g., Board of Education v. Allen, 392 U.S. 236, 243

(1968); Abington School District v. Schempp, 374 U.S. 203, 216 (1963); Torcaso v. Watkins, 367 U.S. 488, 493, 495 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); McCollum v. Board of Education, 333 U.S. 203, 210-12 (1948). See also Roemer v. Board of Public Works, 426 U.S. 746 (1976); Walz v. Tax Commission, 397 U.S. at 695 (opinion of Harlan, J.); Zorach v. Clauson, 343 U.S. 306, 314 (1952). The lesson that inescapably emerges from this consistent judicial tradition is that legislation conditioning the receipt of any significant benefit, power, or privilege on the commitment of the members of the recipient group or institution to a religious faith is inherently a "law respecting an establishment of religion".

Section 16C extends its benefits beyond churches to schools, which are defined as "elementary or secondary school[s], public or private, giving not less than the minimum instruction and training required by [state law] to children of compulsory school age."[9/] This does not dilute its forbidden religious classification. The legislation defines in some detail the additional group to which it extends benefits - schools - and this definition cannot encompass all who are otherwise similarly

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[9/] Appellee argues that many Massachusetts shools are in fact religious. Our ground for decision makes it unnecessary for us to consider this contention. Cf. Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855, 859-61 (1st Cir. 1980) (examining facts to determine the "true color" of a facially neutral benefit).

situated to churches in all respects except dedication to "divine worship".[10]

We therefore conclude that section 16C has a "primary" or "principal" effect of advancing religion.[11] Consequently the district court's holding that section

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[10] We observe that the present form of section 16C has been in place since 1970. Prior to this time the state sought to regulate this aspect of alcohol sales by different means. See Arno, Mass. at - , 384 N.E.2d at 1226-27. Since these prior formulations are no longer in effect, we do not consider them in our analysis here and express no opinion as to their constitutional validity.

[11] Because section 16C substantially abridges the First Amendment, appellee has standing to mount this facial attack on the statute even though it might be similarly affected by a properly drawn law. See, e.g., Village of Schaubmerg v. Citizens for a Better Enviornment, 444 U.S. 620, 634 (1980).

(footnote continued)

16C is unconstitutional is affirmed.

CAMPBELL, Circuit Judge (Dissenting). My reasons for believing section 16C is constitutional are set forth in the panel's decision, and I do not repeat

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(footnote continued)

The Twenty-first Amendment does nothing to alter our decision in this case. See Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979); Women's Liberation Union v. Israel, 512 F.2d 106 (1st Cir. 1975).

Our conclusion regarding primary effect obviates the need to consider whether section 16C also causes excessive entanglement with religion. Meek v. Pittenger, 421 U.S. 349, 363 n.13 (1975) (no further consideration needed once primary effect found). It also makes it unnecessary for us to consider the district court's alternative due process analysis since this at most could provide parallel support for the finding of unconstitutionality. The same is true of its antitrust reasoning, since appellee informs us that is [sic] makes no claim for money damages.

them. By way of supplement, however, I add the following. I think the court strains to find an establishment clause violation. This case does not involve a grant a state fiscal aid to religious institutions. Neither does it (although the court seems to imply otherwise) involve the placing of governmental power and prestige behind religious dogma. Cf. Epperson v. Arkansas, 393 U.S. 97 (1968); School District of Abbington v. Schemp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962). Nor can this case by any stretch of the imagination be equated with those in which governmental privileges have been granted or denied individuals on the basis of their religious beliefs. See Thomas v.

Review Board, 49 U.S.L.W. 4341 (April 6, 1981); Torasco v. Watkins, 367 U.S. 488 (1961); cf. Welsh v. United States, 398 U.S. 333 (1970).

My colleagues hold that carving out a zone of protection for churches and schools against liquor-serving establishments constitutes a "law respecting the establishment of religion" because it conditions a "valued benefit or power" upon the commitment to a religious faith. However, section 16C must be viewed against the accepted practice in our society of enacting zoning and other land-use planning laws designed to protect uses believed to require peace and quiet from more offensive and raucous uses - among the latter of which, historically, liquor service stands preeminent. Section 16C regulates only the uses of buildings and property; it is not the sort of law (such as those relating to conscientious objector status) which seeks to ascertain the "beliefs" of individuals. One can be entirely irreligious and still perfer to give an edge to churches over liquor-serving establishments in land-use planning.

Plainly, section 16C was not designed, in some active way, to "promote" or "advance" religion. Its object is only to limit a use - realistically viewed as having a potential for nuisance - where it may encroach upon the sensibilities of persons engaging in church-type activities (which might range from worship to mens' clubs and scouting) commonly believed even by non-religious persons to require a different environment from that associated with liquor service. Similar considerations might lead the legislature to protect hospitals and libraries against incompatible neighbors - indeed it is commonplace to outlaw liquor establishments from residential areas.

If my brothers' analysis is to stand, the first amendment must rule out not only the present law but even the most modest laws banning liquor licenses next door to a church. Land-use planning would have to ignore churches altogether since such planning would confer a "valued benefit or power" upon them.

Surely such an analysis cannot be right. Indeed, the free exercise clause would seem to mandate that churches be allowed the same type of consideration that the legislature might constitutionally give to some other quiet-seeking land use as part of the legislature's overall power to organize the different land uses in a generally acceptable pattern.

The kind of land-use planning here in issue is, moreover, better left to legislatures. Most members of the electorate - even most churchgoers - are likely to appreciate a good meal and an occasional drink. They are well able, through their legislators, to strike a balance between overprotecting churches and underprotecting the owners of restaurants and bars and their patrons. The decisions that must be made are part of a zero sum game where success on one side means loss on the other. Surely society as a whole should be allowed to make such decisions which fine-tune the sort of society we live and work in. The court's fiat means that even if a large majority of the citizenry wishes an accommodation more favorable to land uses such as churches - because of the peace and quiet associated with them, their esthetic value, and the special qualities they lend to the community, not necessarily because of their religious connotations - the majority must lose out. I see nothing in the first amendment which so divests the citizenry of their right to regulate the kind of community they wish to inhabit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
PLAINTIFF, APPELLEE
v.
HERBERT N. GOODWIN, ET AL.,
DEFENDANTS, APPELLEES

CAMBRIDGE LICENSE COMMISSION, ET AL.,
DEFENDANTS, APPELLANTS.

No. 80-1654

GRENDEL'S DEN, INC.,
PLAINTIFF, APPELLEE,
v.
HERBERT N. GOODWIN, ET AL.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO,
U.S. DISTRICT JUDGE]
495 F.Supp. 761 (1980)

BEFORE COFFIN, CHIEF JUDGE,
CAMPBELL, CIRCUIT JUDGE, AND
HOFFMAN*, SENIOR DISTRICT JUDGE.

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*Of the Eastern District of Virginia, sitting by designation.

Gerald J. Caruso, Assistant Attorney General, and Birge Albright, with whom Francis X. Bellotti, Attorney General, and Thomas Miller, Assistant Attorney General, were on brief, for appellants.

Laurence H. Tribe, with whom David Rosenberg, and Ira Karasick, were on brief, for appellee.

April 7, 1981

Campbell, Circuit Judge. Grendel's Den is a restaurant which plaintiff-appellee Grendel's Den, Inc. has operated since 1971 in Harvard Square, Cambridge, Massachusetts. Grendel's and the Holy Cross Armenian Catholic Parish Church occupy buildings that are about ten feet apart. Located back to back on premises that share a common rear property line, both buildings are near a busy motor and pedestrian intersection.

On May 13, 1977, Scorpio's Inc., a holder of an All Alcoholic Restaurant

License, applied to defendant-appellant Cambridge License Commission (CLC) for approval to transfer its license to Grendel's pursuant to a purchase arrangement with the latter. In conformity with state law, notice of the transfer application was published in a local newspaper and mailed to all abutting property owners and to all schools, hospitals, and churches within a 500 foot radius of Grendel's, including the Holy Cross Church. Mass. G.L. c.138, §15A. On May 25, 1977, Holy Cross notified the CLC of its objection to the license transfer.[1]

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[1] The objection was in the form of a letter written by Holy Cross's Pastor, which read, in part:

> "The Council of the Holy Cross Church and the parishioners unanimously rejected in the past and again in the present, the idea of having

(footnote continued)

Mass. G.L. c.138, §16C provides, in part:

> "Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto. . . ."[2]

(footnote continued)

> so many liquor licenses so near to our Church.
>
> "We already have plenty of noise, dirt, and abuse from Grendel's Den, Inc.
>
> "We are kindly asking the Commission to reject the above License. Holy Cross Church Council and myself --Pastor of Holy Cross Church personally--object to the transfer of any liquor license to Grendel's Den, Inc."

[2] "Church" is defined, in section 16C, as "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses. . . ." It is not disputed that Holy Cross is a "church" within the meaning of the section.

On May 31, 1977, the CLC denied the application for the transfer to Grendel's of Scorpio's license, citing Holy Cross's objection. Grendel's and Scorpio's appealed the CLC's decision to the Massachusetts Alcoholic Beverages Control Commission (MABCC), which on September 8, 1977, following a hearing, sustained the action of the CLC. MABCC noted that "the church's objection under Section 16C was the only basis on which the transfer was denied."

On November 7, 1977, Grendel's instituted this action in the district court against MABCC, CLC and their individual members, alleging that section 16C "on its face and as applied" was unconstitutional and violated the Sherman Act. Shortly thereafter, the parties agreed to suspend further proceedings in the case pending the decision of the

Massachusetts Supreme Judicial Court in Arno v. Alcoholic Beverages Control Commission, Mass. Adv. Sh. 104, 384 N.E.2d 1223 (1979), which upheld section 16C against state and federal constitutional attack. After the Arno decision was rendered, each party moved for summary judgment on the issues of the statute's facial constitutionality and the applicability of the "state action exemption" to Sherman Act liability.[3/] On August 14, 1980, the district court held that section 16C violated the due

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[3/] The parties have notified us that proceedings on Grendel's "as applied" constitutional claims, as well as the merits of Grendel's Sherman Act challenge, "were reserved and postponed." It is not clear in what manner Grendel's "as applied" claims differ from the constitutionally based arguments made before us in this appeal. To the extent these claims are no longer viable in light of this opinion, we would expect them to be summarily dismissed.

process clause of the fourteenth amendment and the establishment clause of the first amendment (as applied to the states through the fourteenth amendment); on September 5, 1980, the court entered judgment in favor of plaintiff on these constititional claims. The district court also denied defendants' motion to dismiss the Sherman Act claim on grounds of state action immunity; the denial of the motion is before us on appeal pursuant to 28 U.S.C. § 1292(b).

I.

Section 16C in its current form is essentially the third version of a provision first enacted in 1954. The first version, inserted by Mass. St. 1954, c. 569, § 1, was a categorical ban on the licensing of premises (other then those of an innholder) located within 500 feet of a church or school. A 1968 amendment permitted licensed premises within the 500 foot radius "if the governing body of such church or school assents in writing." Finally, Mass. St. 1970, c.192, § 1, substituted the present language, prohibiting licensing within the 500 foot zone "if the governing body of such church or school files written objection thereto. . . ." See Arno, supra, 1979 Mass. Adv. Sh. at 109, 384 N.E.2d at 1226-27.

In evaluating section 16C, the district court proceeded from the premise that the first version of the law was plainly valid: "It is well established that a state, acting under the power granted by the Twenty-first Amendment, may constitutionally ban the sale of liquor within a specified radius of a church." 495 F.Supp. at 763. The court nevertheless believed that the current version of section 16C contravened guarantees of due process by effectuating an improper delegation of legislative power to private entities. In so holding, the district court relied on three Supreme Court cases dealing with the delegation of legislative authority.[4/]

[4/] Grendel's contends that the operation of section 16C has deprived it of "liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. We observe at the outset that it is by no means clear precisely how, if at all, the due process clause serves to constrain a state's procedure for granting limited numbers of privileges to conduct a highly regulated enterprise.

(footnote continued)

In Eubank v. Richmond, 226 U.S. 137 (1912), the Court invalidated a city

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(footnote continued)

Surely Grendel's has no "entitlement" to a liquor license such as would implicate a property interest; nor does an application for a liquor license involve a "fundamental" or "natural" right--such as the right to earn a living, engage in one's chosen profession, or even to engage in activities generally available to citizens on equal terms with others --that might be characterized as a protected "liberty" interest. See Wisconsin v. Constantineau, 400 U.S. 433 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976), cert. denied, 434 U.S. 891 (1977); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973). Grendel's "due process" argument, however, is replete with implications that the Commonwealth's mechanism for granting liquor licenses involves arbitrariness, discrimination, and corruption. Since we assume that, at some point, government arbitrariness or misconduct in the granting of liquor licenses might constitute a due process violation, we proceed to examine Grendel's due process claim.

ordinance that empowered owners of two-thirds of the property abutting on any street to establish, within a specified range, a building set-back line for that street. Fines were imposed on persons constructing new buildings that did not respect the set-back line thus established. The Court considered "the question in the case" to be whether the ordinance was "a valid exercise of the police power." Id., at 142. It concluded that, because private property owners were given the power to control the use of property owned by others, thus giving rise to a zoning plan with little consistency from block to block, the ordinance was not a reasonable exercise of police power such as would support restrictions on land use:

> "One set of owners determine not only the extent of use but the kind of use

> which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power?"

Id., at 143.

Five years later, however, in Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917), the Court upheld a city ordinance that prohibited the construction of billboards in residential areas without the consent of the owners of a majority of frontage property on the block in which the billboard was to be erected. The ordinance was within the city's police power because regulation of billboards had been shown to be "in the interest of the safety, morality, health and decency of the community." Id., at 530. The Court labelled "palpably frivolous" the claim that the ordinance's validity was impaired by the provision permitting modification of the billboard prohibition upon the consent of private property owners:

> "The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is [not*] injured by the operation of a law or ordinance cannot be said to be deprived by it of either constititional right or of property."

Id., at 530.

The last of the three cases, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), concerned a comprehensive zoning ordinance which included among the permitted uses in a certain residential district "a philanthropic home for children or for old people. . .when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred feet of the proposed building." Reiterating that zoning restrictions interfering "with the general rights of the land owner by restricting the character of his use. . . cannot be imposed if [they do] not bear a substantial relation to the public health, safety, morals, or general welfare," id., at 121, the Court held that the ordinance exceeded the city's police powers:

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*The appellants note that the word not was omitted from the First Circuit opinion.

> "The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance."

Id., at 121.[5/]

5/ The zoning ordinance in Roberge allowed in the district in question, besides single family dwellings, various institutional uses such as schools, fraternity, sorority and boarding houses, and a clubhouse or memorial building. None of these uses required prior approval by nearby landowners. The "philanthropic home for aged poor," on which the dispute centered, was "an attractive, two and a half story fireproof house large enough to be a home for 30 persons." 278 U.S. at 117. This structure, the Court said, would be mostly hidden by trees and shrubs, would cover only four percent of the tract, and would be at least 110 feet from the nearest building. The foregoing factors were relevant to the Court's conclusion that, unlike the billboards in Cusack, supra, 242 U.S. 526, the proposed new home would not be "a nuisance" or "work any injury, inconvenience or annoyance to the community, the district or any person." 278 U.S. at 122. See also Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974). The Court even included what might be construed as an expression of its doubt that the exclusion of philanthropic homes, a use not "by reason of [its] nature. . .liable to be offensive," 278 U.S. at 122, would be valid even absent a delegation of power:

(footnote continued)

A primary concern expressed by the Court in the above cases was the relation of the contested ordinances to matters properly the subject of state or municipal regulation under the "police power." Only in Cusack, where the facts were sufficient to warrant the conclusion that the billboards "would or were liable to endanger the safety and decency" of

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(footnote continued)

> "We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration."

Id., at 123.

residential neighborhoods, Roberge, 278 U.S. at 122, was such a relation found; in that situation, the consent of those who might otherwise be harmed by the questionable use could lawfully be required. In the instant case, the power of the state under the twenty-first amendment to regulate the dispensation of liquor is both unquestioned and broad. See California v. LaRue, 409 U.S. 109, 115 (1972); Ziffrin v. Reeves, 308 U.S. 132 (1939). Clearly, it can be said even more emphatically than was said of the restrictions on billboards in Cusack that the restrictions on liquor licensing involved here are properly within the state's regulatory power. Likewise, if, as the Court's analysis in Roberge suggests, important distinctions are to be drawn between uses that are potential nuisances or, at least, annoyances to the community and those that are not, see also Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974), the present case is analogous to Cusack rather than to Eubank or Roberge. [6/]

6/ It may be significant that Eubank and Roberge were cases involving zoning ordinances and decided during a period when "[t]he line which in [the] field [of regulatory zoning] separate[d] the legitimate from the illegitimate assumption of power [was] not capable of precise delimitation." Village of Euclid v. Ambler Realty Co., 272 U.S. 359 (1926). In fact, at the time Eubank was decided there was a significant question whether a municipality had any power to establish building set-back lines. Gorieb v. Fox, 274 U.S. 597, 609-10 (1927). Likewise, as already noted, the Roberge Court seemed at least as concerned with the fact that philanthropic homes had not been shown to be either offensive or inconsistent with the uses permitted in the district as it was with the fact that private parties had some participation in making zoning decisions, and seemed to call into question whether

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A general principle to be gleaned from Eubank, Cusack, and Roberge is that legislative bodies may not abrogate

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philanthropic homes could be prohibited in such a district at all. See note 5, supra. Indeed, ten years after Roberge was decided, the Court distinguished it as a "case. . .where a prohibition of an inoffensive and legitimate use of property [was] imposed not by the legislature but by other property owners. . . .," (emphasis added), Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding a provision making federal regulation of tobacco auctions applicable only in markets where two-thirds of growers favored regulation). In another case, the Court described Eubank and Roberge as concerning instances where the "property affected had been acquired without any preexisting restriction in respect to its use or disposition" and "the imposition of the restriction in invitum was authorized after complete and unrestricted ownership had vested in the persons affected." Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936).

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their responsibility to formulate and impose policy regarding matters such as zoning or the issuance of governmental privileges, by delegating this responsibility to private parties "uncontrolled by any standard or rule prescribed by legislative action. . . ." Roberge, supra, 278 U.S. at 122. When, however, a legislative body has decided, in valid

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In this case there is no question that the contested provision deals with subject matter--public distribution of liquor--that is at the heart of the state's regulatory power and concerns a use not presumptively "legitimate" and "inoffensive." There is similarly no expectation that private property owners may without restriction convert their properties into taverns; the expectation is quite the opposite, i.e., that one is not entitled to sell liquor until one obtains a state license to do so.

exercise of its powers, that it is necessary to restrict a use manifestly subject to regulation, the problem of an abdication of legislative responsibility lessens and it may then be appropriate to condition the imposition of such restrictions upon lack of consent to the potentially offending use by the parties that the regulation seeks to protect. *Cusack*, 242 U.S. at 531; *see also* *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 n.12 (1976); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). Unlike the district court, we do not construe the above cases to mandate that this mitigating consent be ascertained in only one particular form--that modification of a prohibition upon an affirmative expression of "consent" is valid, whereas modification of the same prohibition upon a "lack of objection" is constitutionally impermissible. Such a distinction would be both artificial and illogical. Rather, the determinative question is whether the "consent" or "lack of objection" of private parties goes only toward the modification of restrictions that have already been validly framed by representative bodies and that reflect a clear expression of governmental policy.

The district court concluded that the 1968 amendment to section 16C, permitting licensing upon the consent of churches and schools in the prescribed area, was valid because it simply incorporated a legislative policy subject to waiver. The court found the current version defective, however, because it "actually licenses private persons to *impose* policy on the public." 495 F.Supp. at 764 (emphasis in original). The 1970 amendment to section 16C was said to have "actually reversed the underlying policy of the statute" so that the legislation was now "neutral" on the question of whether to license establishments in the vicinity of churches and schools. Due to this "substantive change in legislative policy," decision-making in the field had been "effectively delegated. . .to private entities."

We find this assessment of the change effected by the 1970 amendment to be unconvincing. It is far-fetched to suggest that Massachusetts has abandoned its previous concern with providing churches and schools some protection from liquor-serving establishments. We think the underlying policy of the Massachusetts legislature after the 1970 amendment remains much the same as it was before--the legislature continues to doubt, as it always did, the compatibility of licensed establishments operating within 500 feet of a church or school, but now deems it reasonable that the church or school--which, after all, is in the best position to know how the establishment will affect its operations--confirm that it will not waive the protection provided. In Arno, supra, the Supreme Judicial Court examined the three versions of section 16C and concluded:

> "The history of the statute demonstrates a progressive relaxation of licensing limitations against a backdrop of a legislative option of total prohibition. While seeking in part to facilitate the granting of licenses, the Legislature chose also to preserve, where appropriate, its legitimate police power objective of providing a zone of protection.
>
> . . .

> The current provision does not invest the church with a new, expanded power to legislate a prohibition. It merely shifts to the church the burden of objecting, while retaining the essential legislative mandate that no license be granted within the protected area in the face of a non-consenting church."

1979 Mass. Adv. Sh. at 109-12, 384 N.E.2d at 1227-28. We see no reason to disagree with this perfectly reasonable and common-sense analysis.

Massachusetts has formulated a general prohibition on the sale of intoxicating liquor within 500 feet of a church or school. It has also exercised the constitutionally permissible option of conditioning this prohibition on the lack of consent of churches and schools within the prescribed area. Finally, it has adopted the procedural expedient of requiring churches and schools, upon notice of a pending license application, to express their lack of consent rather than placing the burden on license applicants to procure the affirmative consent of these institutions.[7/]

[7/] Mass. G.L. c.138, § 15A requires each applicant to provide churches with notice of the pending license application and, since 1970, to "indicate the necessity of a written objection to prevent the issuance and transfer of such license under the provisions of section 16C." Thus, both before and after the 1970 amendments to c.138, license applicants who sought to operate within 500 feet of a church were required to approach the church for its "consent," the only difference being that after 1970 the church, having been notified of the pending license application and of the necessity of an objection to prevent the license from issuing, is presumed to "consent" if it tenders no response. The most obvious reason for the legislature to replace the requirement that

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Such a legislative scheme is not repugnant to the due process clause.

To be sure, such a scheme of regulation has the potential for producing

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all churches or schools within 500 feet give their "consent" with a provision permitting licenses to issue if there is no objection, is to protect potential licensees against churches and schools that, either for lack of interest of their perhaps unwieldy governing boards or because of concern of some members over taking a "pro-liquor" stance, might simply neglect to furnish their consent even though having no real objection. Thus a church 450 feet distant from an establishment from which it feared no adverse consequences might withhold formal consent even though it would never register any objection. It seems the ultimate in irony that a legislative amendment designed to "fine tune" the statute and render it more workable for all interests should become the basis for arguing that the legislature no longer has a coherent general policy that licensed establishments are likely incompatible with schools and churches.

results that, viewed as a whole under an objective standard, may not seem entirely consistent. The same might be said of any system that provides for individual variances from a set of general restrictions. Grendel's complains that there are presently 26 licensed establishments within a 500-foot radius of the Holy Cross Church and that the Church has failed to object to issuance of at least 14 of these licenses. In addition, Grendel's complaint states that "despite the fact that the Grendel's Den entrance is closer to the entrance of the University Lutheran Church than to the [Holy Cross] Parish entrance, the University Lutheran Church has never interposed an objection to plaintiff's acquiring a license."

This situation reflects little more than the fact that Massachusetts has attempted to closely calibrate its regulation to the individualized needs of protected institutions, by permitting each institution to make assessments of pending license applications--assessments that may take into account such factors as the perceived offensiveness to the institution of public liquor consumption in its vicinity and the threatening nature of a prospective licensee. Thus, while Massachusetts has adopted a legislative policy that prefers the interest of schools and churches over those of liquor-serving establishments, it has also made a concession to license applicants by permitting licensing when the affected churches and schools conclude that they will not be injured thereby.

It is not shocking that the Holy Cross Church has, in the past, found unobjectionable the licensing of 14 establishments within the 500-foot radius. Earlier managers of the church may have had a more optimistic view of the operation of such establishments. The growing numbers of such places may be seen as causing a problem. Located in the midst of a congested business area, the Church may be unconcerned about more remote licensed establishments although it finds distrubing the prospect of licensed premises ten feet away; the Church may also find important the nature of the establishment seeking a license or the conscientiousness of the prospective license holder. Likewise, it is not surprising that of two churches closely situated one might find issuance of a license disturbing while the other does not; a virtue of section 16C is that it accommodates the differing concerns of different congregations.

Grendel's position is that the state may take into account the individualized concerns of churches and schools but that it must place the final decision whether to grant a license in the discretion of a government agency. If the particular needs of the protected institutions are truly to be determinative, however, we fail to see how this additional layer of bureaucracy would enhance either "due process" or the interests of the parties involved. For example, to give adequate weight to Holy Cross's concern with "having so many liquor licenses so near to our Church," the CLC would have had to have given full effect to the Church's objection, at least absent a showing that the objection was made in bad faith or for some invidious reason--a showing which has not been made in this case. Had the CLC undertaken to inquire whether a "reasonable church" would find Grendel's service of liquor objectionable, it would have undermined the legislature's intent that each institution's assessment of what is disturbing be taken into account. Had the CLC chosen to hold against the Church the fact that the Church had permitted licenses to issue to others in the area, it would be in effect encouraging institutions to object in bad faith in order to preserve the right to later make a good faith objection. Had the CLC found the existence of the 26 other licensed premises to be dispositive, it would have overlooked the fact that section 16C provides for variances from a general prohibition; under such a system, the existence of "nonconforming uses" cannot be said to vitiate the force of the overall restriction. Finally, had the CLC been in reality bound to give effect to the Church's objection, although cloaked with authority to make an independent decision, we do not think this would have "sanitized" those aspects of the licensing scheme said to run afoul of the due process clause.

We conclude that section 16C is a reasonable means of regulation in an area where states have wide latitude to regulate, and not dissimilar to schemes commonly used in the fields of licensing and zoning. See, e.g., O'Brien v. St. Paul, 285 Minn. 378, 173 N.W.2d 462 (1969); Robwood Advertising Associates v. Nashua, 102 N.H. 215, 153 A.2d 787 (1959) and cases cited therein. It does not violate the due process clause.

II.

A legislative enactment does not contravene the establishment clause of the first amendment if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980); Committee for Public Education v.

Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). The district court found that section 16C served "the valid secular legislative purpose of protecting spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets" and noted that "Grendel's concedes that such a purpose satisfies the first part of the test." 495 F.Supp. at 766-67. We agree that section 16C serves this secular purpose, and would add that, aside from insulating churches and schools from whatever noise and disruption may accompany liquor-serving establishments, section 16C serves to shield from public liquor consumption those institutions with which such a use might be deemed most incompatible or whose members might be most offended by the use. See Arno, supra, 1979 Mass. Adv. Sh. at 108, 384 N.E.2d at 1226; cf. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."); Berman v. Parker, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.")

Grendel's contends, however, that section 16C has a principal effect of advancing religion and fosters excessive government entanglement with religion. We think the questions of an improper primary effect and excessive entanglement must be analyzed in two parts:

(1) Whether it is constitutionally impermissible under the establishment clause for a state to provide a "zone of protection" from liquor licensing within the vicinity of churches and schools.

(2) If not, whether such a zone of protection becomes invalid when individual churches and schools are "delegated" the decision to object or not object to licensing within the designated zone.

Turning to the first part of this analysis, we conclude that, while a liquor-free zone around churches and schools unquestionably provides a "benefit" to religious institutions, among others, it does not have a "primary effect of advancing religion" as that phrase has been used in Supreme Court precedent. See, e.g., Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (tuition reimbursement to parents of children attending parochial school); Lemon v. Kurtzman, 403 U.S. 602 (1971) (subsidy of parochial school teachers' salaries). Compare Walz v. Tax Commission, 397 U.S. 664 (1970) (upholding exemption of church property and activity from taxation); Zorach v. Clauson, 343 U.S. 306 (1952) (validating arrangement whereby students released from public school to attend religious instruction). See also Tilton v. Richardson, 403 U.S. 672, 679 (1971)

("The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program but whether its principal or primary effect advances religion.") The ban on licensing may enhance the atmosphere of peace ad tranquility in the vicinity of churches, much as the Sunday "Blue Laws" upheld in McGowan v. Maryland, 366 U.S. 420 (1961), helped create a tranquil atmosphere conducive to worship. Moreover, those sects that find the service of liquor repugnant to their religious beliefs will no doubt have their enjoyment of worship heightened by the knowledge that there are no liquor-serving establishments in their own backyard. However, even if these effects are seen to be "primary" and "direct," rather than incidental by-products of the Massachusetts licensing scheme, they do not go further than to provide surroundings accommodating to the free exercise of religion. Churches are not given economic aid, nor are government facilities used for religious purposes. No sect is preferred over another, nor are persons coerced to attend church. There is no state sponsorship of religion. Churches are merely placed in the category of schools and similar types of institutions, whose activities cannot so readily coexist with potentially noisy and troublesome neighbors. The Supreme Court has never held that the state must refrain from all actions that foster an environment favorable to worship. Cf. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)

("We are a religious people whose institutions presuppose a Supreme Being . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions.") While religion can make no claim to special favor, it may request that its special needs be accommodated in ways similar to those of other cherished institutions.

The proper balance to be struck in crowded urban areas between places of conviviality and entertainment, and places like churches and schools which prefer a different environment, would seem best left to the legislature, which reflects the interests of the whole community. Here the legislature has sought to accommodate churches and schools in a certain manner. Recent legislative changes, favorable to the liquor license owners, indicate that both sides continue to have input in the legislative process. In a case such as this, where the primary evils to which the establishment clause was addressed are not at stake, it seems to us no gain to replace this democratic process, in which the diverse voices of our society are heard, by the fiat of a handful of judges. It may indeed portend a loss to do so if courts constitutionalize privately held values so as to override the social consensus.

Grendel's argues that a liquor-free zone presents constitutional problems if its protection extends only to churches and schools (of which some percentage are parochial schools). These institutions, "a substantial proportion of which are religious in nature," are said to constitute only "a narrow category" of the social institutions that might benefit from a licensing ban. We think, however, that the Massachusetts legislature could rationally decide that schools and churches were institutions in need of special protection.[8] It bears repeating that states have broad latitude under the twenty-first amendment to control the manner in which liquor

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[8] Grendel's seems to single out libraries and hospitals as institutions that might benefit from section 16C's protection. (License applicants are currently required, under section 15A, to notify hospitals within 500 feet of the prospective licensed establishment both of the pending license application and of "the necessity of a written objection to prevent the issuance or transfer of such license. . . ." While the objection of a hospital is not given conclusive effect under section 16C, as are those of churches and schools, we

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take the inclusion of hospitals within the notice provision to be some indication that a hospital's objection is to be given especially serious consideration by licensing authorities.) There are numerous conceivable distinctions that could be drawn between churches and schools on the one hand and hospitals and libraries on the other. Libraries often keep limited hours that may not coincide with those of liquor-serving establishments; moreover, libraries are commonly controlled by the same municipalities that make initial licensing decisions, and thus may be better situated than churches to ward off the licensing of potentially troublesome establishments. Likewise, hospitals, often politically powerful institutions within their communities, might be thought able to wield sufficient influence with local licensing boards so as to render their interests protected by notice of pending applications under section 15A. One might rationally decide simply that the service of liquor is less compatible with

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is dispensed. It does not violate the establishment clause for a state to choose, in exercising this power, to refrain from granting licensing privileges in areas where, _in the judgment of the legislature_, such privileges might seriously interfere with the operations of valued institutions. _Cf._ _California v. LaRue_, 409 U.S. 109, 119-20 (1972) (Stewart, J., concurring; suggestion that

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the operations of churches and schools than with those of hospitals and libraries; lines must be drawn somewhere. The point is that it is the legislature's function, not ours, to make such distinctions. So long as the "benefits" conferred on churches are not such as to have a primary effect of advancing religion, it does not matter that churches are among a "narrow class of beneficiaries" under section 16C.

twenty-first amendment enables states to provide that "liquor shall not be sold . . .within 200 feet of a church").

The dissent raises the further spectre that the definition of "church" might be read so as not to include "Buddhism, Confucianism, or transcendentalism." The dissent further contends that "whether a mosque, marabout, pagoda, or tope would qualify [under section 16C] is an open question." There is no reason to believe, however, that the Massachusetts courts would not effect what seems to us the clear intent of the legislature by applying the protections of section 16C to any building primarily used as a place of assembly by a bona fide religious group. It is a familiar canon that statutes be construed so as to preserve their constitutionality. The extent of the class of "religious institutions" and the like is a possible definitional problem under many statutes found consonant with the first amendment, and has not been seen in the abstract as grounds for invalidation. See, e.g., Walz v. Tax Commission, supra, 397 U.S. at 672-73; Zorach v. Clauson, supra, 343 U.S. at 308 n. 1. No problem of definition arises in this case--Holy Cross's status as a "church" is conceded, and neither Grendel's nor the district court has advanced the proposition which worries the dissent that the statute is invalid as favoring some religions over others. In such circumstances, we think it inappropriate to postulate the hypothetical exclusion from section 16C of "groups regularly meeting to discuss situational ethics" as a dispositive factor in the decision.

Once it is decided that a total ban on liquor-serving establishments within the vicinity of a church does not contravene the establishment clause, it is difficult to understand how a provision that, in essence, allows a church to "waive" this protection presents further, and insurmountable, first amendment problems. We have already held that the church's right to object or not object to licensing within the prescribed area is not an improper delegation of "governmental power." Thus we cannot accept Grendel's rhetoric that "section 16C directly invests a church with governmental power, in essence converting each local church into an arm of the state." Nor do we agree that "section 16C forces each affected church to take a public position with regard to a matter of governmental policy." We find that the Commonwealth has established "governmental policy" with regard to liquor licensing; a church simply stands in the position of a private entity entitled to claim or waive a "zone of protection" provided for its benefit.[9]

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[9] Churches are not give carte blanche to decide who their neighbors will be, nor are they given power to "veto" licensing within an excessively broad radius such as five miles. They are simply provided protection within a reasonable area from a controversial and highly regulated use--protection that can be dispensed with when unnecessary. We note, moreover, that a church's lack of objection to a pending license application does not give the applicant an automatic entitlement to a license; the local licensing board retains the authority to deny the license for various reasons. See Arno, supra, 1979 Mass. Adv. Sh. at 110 n.10, 384 N.E.2d at 1227 n.10.

We also reject the district court's conclusion that the section violates the establishment clause because it confers on churches the "opportunity to realize economic advantage and exercise political power." The court reached this conclusion by hypothesizing that "a church under § 16C could lawfully exercise its political power to veto license applications for purely religious reasons"[10] and could also "exercise its veto power solely for its economic benefit by tying that decision, directly or indirectly, to the presence or

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[10] The possibility that similar decisions could be made for such invidious reasons inheres in any scheme under which private entities are entitled to waive a protection provided by statute. This is a relevant consideration in evaluating the scheme under the due process clause, and one that we have taken into account. Having already decided, however, that the Massachusetts licensing procedure

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does not offend due process, we do not think that the slight, hypothetical possibility of discrimination along religious (as well as racial and ethnic) lines suffices to create an independent issue under the establishment clause. The district court postulated that "to take an extreme example, a Protestant church could exercise its veto solely to exclude non-Protestant applicants from obtaining liquor licenses within 500 feet of that church." It might just as easily have been said in Cusack, supra, that a predominantly Protestant neighborhood could have decided to approve the construction of billboards only on behalf of Protestant-controlled corporations. Religious discrimination is not something practiced uniquely by churches; in fact, a charitable observer might even conclude that, at least in the present context, a church is less likely than other private entities to engage in discrimination. In any event, we have difficulty concluding that the mere opportunity to exclude owners of a particular religious denomination from operating liquor-serving establishments within a limited

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absence of a donation by the applicant." 495 F.Supp. at 767. It was "no answer to suggest that most churches would not abuse the power granted them under § 16C. The critical fact is that § 16C provides the potential for such abuse." Id.

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radius has a primary effect of advancing religion. (The parties dispute whether an applicant who could demonstrate that a church had entered its objection for discriminatory purposes would be able to obtain consideration and relief from the MABCC. It seems reasonable to suppose that this or some other avenue of relief would be open to a license applicant who could make such a showing. Since, however, we do not consider this fact determinative to the issue of the statute's facial constitutionality, we need not presently inquire to what extent a church's discriminatory or corrupt misuse of its "veto power" might give rise to remedies under state or federal law.)

We have serious problems with this approach. First, we think a state legislature is entitled to predicate regulation such as section 16C on the rational notion that churches and schools will act in good faith when exercising objections, without risking invalidation of the regulation because of a vague and unsubstantiated "potential for abuse." Cf. Tilton v. Richardson, 403 U.S. 672, 679 (1971) ("A possibility always exists . . .that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement."). The proposition that churches will seize upon the flexibility in the Massachusetts licensing scheme to extort donations from license applicants is not only insulting but, to most people, would seem far-fetched as well as without any evidentiary support. Moreover, such extortion is wholly unrelated to either the legislative purpose behind section 16C or the section's "effect," at least so far as that effect can be gleaned from the face of the statute.

We also find inapposite those cases referred to by the district court in which the Supreme Court "has insisted that there be adequate controls ensuring a purely secular purpose before public programs of aid to private schools are upheld." E.g., Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Public Education, 413 U.S. 472 (1973). In all these cases, state funds or services had been provided to religious-affiliated schools or to parents of children enrolled in such schools. Since it is axiomatic that government may not appropriate money for religious ends, a state obviously bears a great burden to ensure that the funds it gives religious institutions are used only for secular purposes. Section 16C, however, does not give monetary or material aid to churches, but simply provides whatever aesthetic and intangible benefits can be derived from a protective liquor-free zone. It seems strained to suggest that the state must provide a policing mechanism to ensure that the right to waive this protection is not converted into cash, at least in the absence of evidence that such abuse occurs with any frequency.[11] Even if some such abuse were shown, we would have difficulty concluding, as the district court did, that "public money" was thereby being used for religious purposes.

In sum, we find that section 16C does not "on its face" violate the establishment clause, and on the basis of the record before us no establishment clause violation has been shown.

III.

We come finally to the question whether plaintiff's antitrust claim is precluded by the so-called "state action exemption" explicated in Parker v. Brown, 317 U.S. 341 (1942) and subsequent cases. We agree with the district court that the exemption does not apply, both because section 16C's alleged "anti-competitive effects" are not "clearly articulated and affirmatively expressed as state policy," and because there is insufficient state involvement in supervising the alleged "restraints of trade." *See* *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *see also* *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In so holding, we take the gravamen of Grendel's antitrust complaint to be that provision of a selective right to object to licensing enables churches to use their "veto power" on behalf of private persons conspiring to suppress competition,[12] and that the Holy Cross Church has interposed its objection for such anticompetitive ends in this instance. There has been no showing that Massachusetts intended section 16C to authorize and effectuate such private conspiracies,[13] and thus the state action doctrine, said to be germane only when "anticompetitive conduct is compelled by direction of the State acting as sovereign," Cantor v. Detroit Edison Co., supra, 428 U.S. at 791, does not bar the claim.[14]

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[11] Of course, since Holy Cross has exercised its objection here, and thus has decided not to waive the protection, there can be no contention that the Church has in this instance "traded in the marketplace for direct economic benefits" whatever "power" it is given under section 16C.

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[12] Defendants again argue that the MABCC retains power to correct this sort of abuse, *see* note 10, *supra*.

[13] Indeed, defendants themselves maintain that "§ 16C does not, under any construction, authorize a church or school to enter into a conspiracy or agreement in restraint of trade with private persons."

This having been said, however, we confess some difficulty imagining how section 16C "on its face" violates the antitrust laws. Grendel's offers the following description of section 16C:

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[14] As we understand it, appellee does not seek to argue that provision of a liquor-free zone, in and of itself, runs afoul of the Sherman Act. We think such a claim could not stand. As noted above, Massachusetts had adopted a general policy against liquor-licensing in the vicinity of churches and schools. This sort of state "regulation. . .designed to displace unfettered business freedom" in the distribution of alcoholic beverages is, despite possible adverse effects on competition, beyond the scope of the Sherman Act. See New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109-11 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978).

> "Section 16C merely permits, but does not require, any anti-competitive activity. The anti-competitive decision is solely that of the church governing body, reached in possible collusion with various liquor licensees. That the decision becomes effective by virtue of Section 16C does not make the anti-competitive choice one attributable to the state."

If so, one might wonder why the statute is to be declared facially invalid in a suit against state and municipal agencies and officials.

The merits of Grendel's antitrust claim are not before us on this appeal, and we do not decide the issue. However, we do express our doubt, at this point, that a state statute is facially invalid under the Sherman Act merely because it creates some limited (and unused) opportunity for private parties to act anti-competitively.[15]

The judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Coffin, Chief Judge (dissenting). The court upholds a state law that confers upon churches (and schools) an absolute veto power over the proposed sale of alcohol within 500 feet. Although I appreciate the minimal span of this baby step, I believe it has managed to cross the threshold of the Establishment Clause.

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[15] Churches are not engaged in competition with liquor-serving establishments and have no institutional reason for suppressing competition in the liquor trade. Thus, this is not a situation where anti-competitive decisionmaking could be deemed peculiarly likely. Cf. New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (existing automobile franchisees empowered to require hearing on existence of "good cause" to prohibit entry of prospective franchisees).

Because this is a facial challenge, we must read the statute with an eye sensitive to constitutional problems presented by the law's very language. I see several difficulties. First, and, I presently think most important, is the strange delegation of political or governmental power on an explicitly religious basis. Apart from schools, the only entity that can veto a liquor license is "a church or synagogue building dedicated to divine worship and in regular use for this purpose." This formula is an extraordinarily precise definition. The building must be that of a "church" or "synagogue" dedicated to "divine worship". Whether a mosque, marabout, pagoda, or tope would qualify is an open question for the purposed use of the building must be "divine worship". Whether Buddhism, Confucianism, or transcendentalism (of either oriental or New England variety) can be comfortably cabined under such a label may be doubted.

There may well be other important assemblings of the human race whose activities could be described as "worship" but whose object is not "divine"; conversely, there may be those whose objective is "divine" but whose activities fall somewhat short of (or outside of) "worship". Yet in their need for calm and quiet, in their hours of operation, in their political power (or lack of it), they may be identical to the paradigm Christian church or Jewish synogogue. The court's opinion distinguishes between churches and schools on the one hand and hospitals and libraries on the other. These are not the difficult comparison. To me the problem is seen more clearly if we consider, for instance, groups regularly meeting to discuss agnosticism or situational ethics.

I would not relish the task of identifying the institutions, groups, and ephermeral gatherings that would lie within and without the pale. Such line drawing, I fear, would bring one within the interdiction of preferring one religion over another. More importantly, even if all gatherings of religiously oriented humankind can be harmoniously put under one roof, section 16C would confer on religious organizations a governmental power denied to all others except schools.* While governmental assistance to organized religion is effectuated through tax exemptions for institutions and charitable deductions for their adherents, such measures are also widely applicable to other institutions, organizations and causes. I can think of no area where we restrict the receipt of a governmental benefit or privilege solely to a religious group or institution.

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* Cf. Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855, 861 (1st Cir. 1980) (extent to which affected class is sectarian is a "pivotal factor in determining. . .constitutionality").

The court's opinion posits the proposition that since a municipality could impose a liquor free zone surrounding any church, it clearly may soften the impact by allowig churches the option of refraining from vetoing license applications. Whether or not the first part of this proposition is true, the second part does not follow. Although our law gives conscientious objectors the privilege of refusing military service, a law that allowed religious institutions to determine who qualified as conscientious objectors would surely be invalid.

Even if the delegation of power to religious bodies to dispense governmental privilege were permissible, section 16C suffers the particular defect of permitting absolutely standardless exercise of this power. Arno v. Alcoholic Beverage Control Commission, ___ Mass. ___, ___, ___, 384 N.E.2d 1223, 1228, 1229 (1979) (scrutiny of church objection limited "to such questions as whether the objecting institution qualifies as a 'church' for the purposes of the statute, whether it is within the statutorily protected zone of 500 feet, and whether the written objection was duly authorized by the appropriate 'governing body' of the church").

The possession of unbridled discretion is a power we do not give even to popularly elected officials. It is no denigration of religious organizations to acknowledge that, being constituted of fallible human beings, their exercise of uncontrolled discretion may on occasion be less than high minded or, if high minded, wrongly directed. But what troubles me more deeply than easily conjectured examples of arbitrariness is the simple fact that section 16C grants an unrestricted power to deny liquor licenses, a power that can be used to serve sectarian purposes, to churches but not to other similarly situated organizations. So to characterize this case is, for me, to decide it. Laws may not have more than a "remote and incidental" effect in the advancement of religion. Committee for Public Education v. Nyquist, 413 U.S. 756, 784 n.39 (1973). I believe that a statute that invites churches into the neighborhood political area by granting them discretionary veto powers over commercially significant activity based on their religious status must have more than such an effect.

APPENDIX C

GRENDEL'S DEN, INC.

v.

Herbert N. GOODWIN, et al.

Civ. A. No. 77-3418-T

United States District Court
D. Massachusetts

Aug. 14, 1980

Rosenberg, Baker & Fine, David Rosenberg, Cambridge, Mass., Lawrence H. Tribe, Cambridge, Mass., for plaintiff.

Gerald Caruso, Thomas Miller, John E. Bowman, Jr., Asst. Attys. Gen., Boston, Mass., for defendants.

Michael C. Costello, David B. O'Connor, Legal Counsel, Cambridge Mass., for Cambridge License Commission and Davenport and Cremins.

OPINION

TAURO, District Judge.

The plaintiff, Grendel's Den, Inc. (Grendel's), is a Harvard Square area restaurant that has, since 1977, unsuccessfully sought issuance of a liquor license by the defendant Cambridge License Commission (the CLC). The CLC denial was upheld on appeal by the Commonwealth's Alcoholic Beverages Control Commission (the ABCC). It is undisputed that both the local and state authorities have refused to grant Grendel's request solely because of the opposition filed by the Holy Cross Armenian Catholic Parish Church (the Church) under the provisions of Mass. Gen.Laws ch. 138, §16C. That statute states in pertinent part:

> Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed [for sale of alcoholic beverages] if the governing body of such church or school files written objection thereto. . . .

"Church" is defined as a "building dedicated to divine worship and in regular use for that purpose." It is undisputed that the Church meets the definition.

Grendel's asserts that §16C violates the federal constitution in three ways. It first alleges a due process violation by the legislature's delegation to private persons of the power to veto issuance of a liquor license.[1] As a spinoff of that theory, Grendel's next argues that vesting the right of veto in the Church violates the separation of religious and political power mandated by the Establishment Clause.[2] Third,

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[1] U.S. Const. Amend. XIV, sec. 1.

[2] U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion. . . ."). It has long been

(footnote continued)

Grendel's contends that the legislative classifications embodied in §16C are irrational and, therefore, do not afford equal protection of the law.[3] An additional claim by Grendel's is that §16C violates federal antitrust law by creating a licensing system that permits private parties to engage in anticompetitive practices.[4]

The parties suspended action in this case for two years pending resolution of a state court challenge to the same

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(footnote continued)

held that the Establishment clause is applicable to the states under the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

[3] U.S. Const. Amend. XIV, sec. 1.

[4] 15 U.S.C. §§ 1, 2, 15.

statute by another liquor license applicant. In Arno v. Alcoholic Beverages Control Comm'n, ___ Mass. ___, 384 N.E.2d 1223 (1979), the Supreme Judicial Court upheld the validity of § 16C over arguments that it violates both state and federal constitutional provisions.

With the state law issues, thus settled,[5] the parties here filed cross-motions for summary judgment with respect to these four facial attacks on the validity of §16C under federal law.[6] The parties have asked this court, in the interest of expediting this litigation, to rule now on these federal issues, before taking evidence on Grendel's "as applied" arguments. They have also requested that this court certify its decision on those issues for interlocutory appeal under 28 U.S.C. §1292(b).

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[5] The Supreme Judicial Court's rulings in Arno, supra, and Samel v. City of Pittsfield Licensing Board, ___ Mass. __, 384 N.E.2d 1230 (Mass. 1979), have conclusively resolved issues of state law relevant to this case.

[6] With respect to the antritrust theory, the parties have asked at this (footnote continued)

To prepare an adequate basis for prompt decision, the parties have submitted an agreed statement of facts and an agreed statement of contested issues. There being no factual disputes material to the issues presented, and with state law decided, the cross motions for

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(footnote continued)

point only for a ruling as to the availability of a state exemption defense under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942).

then filed a second opposition on May 25, 1977. The CLC thereupon rejected Grendel's application in a letter dated May 31, 1977. The only basis for the CLC's decision cited in that letter was the filing of a proper objection by the Church.

Grendel's then appealed to the ABCC, the state agency charged with enforcing the Commonwealth's liquor regulations. After a hearing, the ABCC on September 8, 1977, upheld the CLC's denial of Grendel's application expressly on the basis of the Church's objection, which the ABCC in that decision characterized as "an absolute veto." Statement of Agreed Facts, Exhibit E.

II.

[1] It is well established that a state, acting under the powers granted by

Twenty-first Amendment, may constitutionally ban the sale of liquor within a specified radius of a church. See, Arno, supra, 384 N.E.2d at 1226 (citations); California v. LaRue, 409 U.S. 109, 120, 93 S.Ct. 390, 398, 34 L.Ed.2d 342 (1972) (Stewart, J., concurring) (dicta). Such a ban, properly enacted by the legislature, raises none of the issues advanced by Grendel's in its attack on the operation of §16C.

[2] On the other hand, the state's powers under the Twenty-first Amendment do not abrogate other constitutional guarantees. See, California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 109, 100 S.Ct. 937, 945, 63 L.Ed.2d 233 (1980); See also P. Brest, Processes of Constitutional

Decisionmaking, Cases and Materials, 258 (1975), cited with approval in Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). The Supreme Court has noted that "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." Craig, supra, at 206, 97 S.Ct. at 461. Indeed, in Craig the Court struck down on equal protection grounds a state statute setting different ages at which males and females could drink beer.[7]

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[7] See also, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79, 92 S.Ct. 1965, 1974, 32 L.Ed.2d 627 (1972) (state liquor regulation cannot invidiously discriminate in violation of equal protection).

[3] It is clear, therefore, that a state's right to regulate liquor sales is not absolute. Regulations promulgated under the umbrella of the Twenty-first Amendment are subject to the same standards of scrutiny developed to evaluate the constitutionality of other kinds of state action. Within this framework, the court now examines plaintiff's various theories for relief.

A. Due Process

The plaintiff's principal due process argument rests on three Supreme Court decisions defining the kind of power legislatures may delegate to private entities.

In Eubank v. Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912), the Court voided an ordinance which gave the power to establish building setback lines to the owners of two-thirds of the property abutting any street. In Cusack Co. v. Chicago, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1917), the Court upheld a municipal restriction banning billboard construction unless the owners of a majority of the affected property waived the restriction. The triad was completed by Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), in which the Court struck down an ordinance permitting the establishment of homes for the elderly only on the written consent of the owners of two-thirds of the property located within 400 feet of the proposed site.

[4] As the Supreme Judicial Court observed in Arno, the teaching of these

cases is that a legislature may not delegate the power to impose a restriction. Arno, supra, 384 N.E.2d at 1227 (citing cases). The principle embodied by this rule is that legislative power may only be exercised by the legislative body, though in specific instances affected parties may be authorized to waive an otherwise applicable legislative restriction. Cusack, supra, 242 U.S. at 531, 37 S.Ct. at 192; City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 & n.12, 96 S.Ct. 2358, 2363-64 & n. 12, 49 L.Ed.2d 132 (1976). Given this standard, therefore, the test of a statute is whether it incorporates a legislative policy subject to waiver or whether it actually licenses private persons to impose policy on the public.

Section 16C, as presently enacted, is the third approach adopted by the Massachusetts legislature to regulate liquor outlets located near a church or school. As originally enacted in 1954, §16C flatly forbade the licensing of liquor outlets within 500 feet of a church or school. In 1968, the legislature amended §16C to permit licenses within the 500 foot radius, provided "the governing body of such church or school assents in writing." The statute was then amended to its present form in 1970. Arno, supra, 384 N.E.2d at 1226-27.

The 1954 version of §16C was a constitutional exercise of the Commonwealth's power to regulate alcohol in its promulgation of an absolute ban.

Similarly, the 1968 version comported with the Cusack standard as the legislature there provided a clear statement of policy, but permitted individual churches and schools to exercise their discretion to waive the legislative ban on liquor outlets near them.

The present §16C, however, presents a quite different picture. There is now no general legislative proscription on liquor licenses within 500 feet of a church or school. The statute on its face reflects legislative neutrality concerning the proximity of liquor outlets to churches or schools. The decision as to whether a license may issue at a location within 500 feet of a church or school has been delegated to the affected institution. Legislative neutrality, therefore, has effectively delegated the policy decision of liquor licensing to private entities. An objection filed by such a private entity is unreviewable[8/] and, therefore, operates as an absolute veto over any application subject to § 16C.

[8/] The Arno court noted that a hearing is available to test whether a filed objection meets the statutory criteria--i.e., whether the objector is a church or school actually located within 500 feet of the applicant's premises and whether the objection was authorized by the objector's governing body. See Arno, supra, 384 N.E.2d at 1228. Indeed, the Church's first objection to Grendel's application was rejected by the CLC for failure to meet the statutory element of due authorization.

Arno makes clear, however, that a church or school may object without having to submit to a hearing at which its reasons or motives are examined or explained. Id. Simply put, under §16C a church or school may exercise its discretion to object for good reason, bad reason, or no reason at all.

Even if the legislature intended to maintain a general prohibitory policy when it amended §16C in 1970, that intention could not save an otherwise invalid delegation of power. Due process analysis focuses on the effect of a statutory scheme. The effect of § 16C is to vest authority in private persons "uncontrolled by any standard or rule prescribed by legislative action." Roberge, supra, 278 U.S. at 122, 49 S.Ct. at 52. It is that lack of a legislatively enacted standard which makes §16C an example of legislative neutrality creating unwarrantd delegation.[9/]

[9/] Thus, certification of the issue of leiglsative intent to the Supreme Judicial Court, as suggested by the Commonwealth, would be pointless, since such a determination would have no bearing on the effect of the statute's actual operation.

The Commonwealth argues that the state's power to ban all liquor outlets near churches or schools implies the lesser power to conditionally approve licenses, given the consent of affected institutions. It supplements that argument by contending that the 1970 enactment of §16C merely shifted the burden of objection to the church or school, thereby relieving the applicant of the burden of gaining consent. See Arno, supra, at 1227. The Commonwealth would, therefore, characterize the 1970 amendment as a liberalization of the law with respect to license applicants such as Grendel's.

The Commonwealth's theory misconceives the due process interests at stake here. The distinction between waiving a legislative restriction and imposing a private one is not merely procedural. Rather, that distinction is one of critical substance, established by the Supreme Court to set an outer limit to the exercise of public power by private persons. To ignore that distinction would deprive Grendel's of a liquor license, without any legislative, judicial or administrative determination that its issuance would be contrary to the public interest. Instead, Grendel's would be deprived of a license solely because a private entity "uncontrolled by any standard or rule" vetoed its application. Against this fundamental deprivation of due process, no "liberalization" or "lesser included power" argument can survive.

This court respectfully disagrees with the Supreme Judicial Court's determination that there is "no material distinction [between the 1968 and 1970 enactments] for the purpose of analyzing the delegation issue." Arno, supra, at 1228. The 1970 amendment had greater substantive effect than merely shifting the burden of objection. Rather, the 1970 amendment actually reversed the underlying policy of the statute. Before 1970, no application was processed until the consent of §16C entities had been solicited and obtained by the applicant. The policy was clear. The position of the Commonwealth was not neutral. Liquor licenses were banned, unless the affected church or school signified approval. To the contrary, the present policy under §16C is that liquor licenses are presumed to be proper for further processing, unless a church or school files an objection. Given such an objection, the issue is foreclosed without appeal or other recourse.

The substantive distinction becomes apparent when one considers the effect of a church's silence under each of the statutory schemes. Given a church's silence before 1970, the Commonwealth imposed an absolute bar to the granting of a license. Since 1970, the Commonwealth's policy is to permit further consideration of an application, should a church or school remain silent on the issue. That difference reflects more than a mere imposition on a church of a burden to object. It demonstrates a substantive change in legislative policy. In making that substantive change, the legislature impermissibly delegated, rather than exercised, its power. It is precisely that delegation which triggers the due process concerns delineated by Eubank, supra, and its progeny.

[5] This court concludes, therefore, that the delegation of veto power to churches and schools established by §16C violates the Due Process Clause of the Fourteenth Amendment.[10]

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[10] Plaintiff has also assailed §16C as violative of due process because of the lack of a hearing to probe the standards and motives governing §16C entities' exercise of their veto powers. In view of this court's decision concerning plaintiff's primary due process claim, it is unnecessary to reach this issue.

To the extent that §16C is invalid because it permits private parties to use pubic power for invalid purposes,

(footnote continued)

B. The Establishment Clause

In recent cases, the Supreme Court has established a comprehensive analytic framework for testing the validity of a statute challenged under the Establishment Clause. To be valid under this analysis, a statute 1) must have a secular legislative purpose, 2) must have a principal or primary effect that neither advances nor inhibits religion, and 3) must not foster an excessive entanglement with religion. The degree of entanglement between state and religion is to be measured by considering a) the character and purpose of the benefited

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(footnote continued)

those aspects of §16C are better discussed in connection with particular allegations made by Grendel's, e.g., its Establishment Clause and antitrust claims, infra.

institution, b) the nature of the benefit, c) the resulting relationship between the state and the religious authority, and d) the potential for political divisiveness created by the challenged statute. See Committee for Public Education v. Regan, 444 U.S. 646, 650, 100 S.Ct. 840, 845, 63 L.Ed.2d 94 (1980); Wolman v. Walter, 433 U.S. 229, 235-36, 97 S.Ct. 2593, 2598-99, 53 L.Ed.2d 714 (1977); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 748-49, 96 S.Ct. 2337, 2345-46, 49 L.Ed.3d 179 (1976).

Though the test is well-established, even the Supreme Court has recognized that is decisions have "sacrifi[ced] clarity and predictability for flexibility," Regan, supra, 444 U.S. at 662, 100 S.Ct. at 851, and have erected a "blurred, indistinct, and variable barrier" between church and state, Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). That alone makes a detailed analysis of applicable precedent of dubious value in this case. Moreover, the Court has apparently never faced the situation presented here--a legislative delegation of licensing power to a church. For both reasons, this court's application of the three-pronged test must proceed largely without the guidance of controlling precedent.

The Commonwealth first defends §16C as having the valid secular legislative purpose of protecting spiritual, cultural, and educational centers from the "hurly-burly" associated with liquor outlets. Grendel's concedes that such a purpose satisfies the first part of the test. As §16C includes public schools as well as private churches within its ambit, and because the legislature could reasonably believe that community activities at either type of institution might be adversely affected by proximity to liquor outlets, Grendel's concession of a legitimate secular purpose seems fully warranted. See Walz v. Tax Commission, 397 U.S. 664, 672-73, 688-89, 90 S.Ct. 1409, 1413, 1421, 25 L.Ed.2d 697 (1970) (plurality opinion of Blackmum, J., and concurring opinion of Brennan, J.); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 1117, 6 L.Ed.2d 393 (1961).

The second element of the test requires a finding of unconstitutionality if the statute might "in part have the effect of advancing religion," Committee for Pubic Education v. Nyquist, 413 U.S. 756, 784 n. 39, 93 S.Ct. 2955, 2971, n. 39, 37 L.Ed.2d 948 (1973), quoting and adding emphasis to Tilton v. Richardson, 403 U.S. 672, 683, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971). Grendel's contends that §16C effectively promotes religious authority by conferring on churches the unfettered opportunity to realize economic advantage and exercise political power.

The political dimension of §16C has already been partly described in the discussion of due process, supra. What merits emphasis here is the extent to which a church under §16C could lawfully exercise its political power to veto license applications for purely religious reasons. Thus, to take an extreme example, a Protestant church could exercise its veto solely to exclude non-Protestant applicants from obtaining liquor licenses within 500 feet of that church. Even such a discriminatory and ignoble motive would not be subject to review, because §16C provides the church with unfettered discretion to file an objection that constitutes an absolute veto of the application. See note 8, supra.

Similarly, a §16C institution could conceivably exercise its veto power solely for its economic benefit by tying that decision, directly or indirectly, to the presence or absence of a donation by the applicant. Indeed, the relevance of such potential economic benefits to the Establishment Clause issue becomes all the more striking when one considers the institutions granted veto power under §16C. Public schools are rarely, if ever, the beneficiaries of donations. The potential economic benefit conferred by §16C, therefore, is effectively limited to churches and private schools --many of the latter, of course, being directly or indirectly controlled by churches.

It is no answer to suggest that most churches would not abuse the power granted to them under §16C. The critical fact is that §16C provides the potential for such abuse. While the Supreme Court's decisions do not, for the reasons described earlier, provide precise guidance for this court, they do underscore one basic admonition. Public money and public power may not be used if a primary effect of that use is to advance churches as religious institutions. See Walz, supra, 397 U.S. at 688-89, 90 S.Ct. at 1413 (Brennan, J., concurring). Thus the court has insisted that there be adequate controls ensuring a purely secular purpose before public programs of aid to private schools are upheld. See, e.g., Regan, supra, (concerning secular control of test grading and discussing precedents). By providing no such controls, §16C legitimizes the potential use of delegated public power for religious purposes.

Against this effect, the Commonwealth's proffer of a predominant secular purpose is unavailing. It must be stressed that the "primary effect" test looks to the actual effect of a statute, not the legislative intent behind its enactment. Nyquist, supra, 413 U.S. at 773-74, 93 S.Ct. at 2965-66. Nor does the existence of an actual secular effect save §16C. It is true that a merely incidental benefit to a church will not void an otherwise valid statute, see Roemer, supra, 426 U.S. at 748, 96 S.Ct. at 2345. But, §16C clearly provides churches with more than a merely incidental benefit. The statute delegates political power that may be weilded by a church to advance it as a religious institution. It is precisely that relationship between political and religious authority that the Establishment Clause forbids.

[6] The Commonwealth's further defense, based upon the presumed constitutionality of statutes banning liquor licenses near churches, misses the point.

Such statutes are clearly distinguishable. Section 16C does not impose such a flat statutory ban. Indeed, §16C's Establishment Clause defect exists because that statute does not impose a flat ban. Instead, it grants churches uncontrolled and standardless veto power to determine what licenses will be banned.[11] The legislature may not delegate that kind of power to a church.[12/]

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[11] Zoning regulations also present the potential for bargaining and discretion, and churches may, of course, exercise such powers along with other property owners subject to such regulations. In zoning, however, the breadth of regulation negates any finding that the regulations has a primary effect of advancing religion. Here, because §16C defines a narrow class of beneficiaries and because churches and their related schools compose such a large part of the protected class, the same inference of neutrality cannot be drawn.

Likewise, a licensing structure in which the local licensing board could consider a church's objection, but would retain the right to make an independent determination, is distinguishable from this case.

[12/] The defendants have cited three lower state court opinions which they claim as precedent upholding the validity of §16C. The first, Appeal of Rusch, 32 Pa. Cmwlth. 578, 379 A.2d 1375 (1977), is inapplicable because it involved the exercise of licensing board's discretion in rejecting an application for a license near a church. Moreover, no constitutional challenge was either advanced, considered, or decided in Rusch. The second Horne v. Hernando County, 297 So. 2d 606 (Fla. App. 1974), is distinguishable because it upheld a county ordinance flatly banning licenses within 1500 feet of church or school.

The third case cited, Wiles v. Michigan Liquor Control Comm'n, 59 Mich. App. 321, 229 N.W. 2d 434 (1975), did reject an Establishment Clause attach on a statute virtually identical to §16C. But it is clear from the opinion in Wiles that the court was not presented with the specific due process and Establishment Clause arguments advanced here. Indeed Wiles contains only a short paragraph concluding that the licensing statute did not have the primary effect of advancing religion. Given its conclusory nature, Wiles is hardly persuasive authority on the issues before this court.

C. Equal Protection.

Grendel's advances two arguments in support of its assertion that §16C denies equal protection of the laws. First, it claims that the exemptions included in §16C are wholly irrational. Second, it contends that the potential for arbitrary action created by §16C constitutes the kind of capricious decision making prohibited under the Equal Protection Clause.

[7] It is well settled that the breadth of a state's power to regulate economic behavior is vast. See City of New Orleans v. Dukes, 427 U.S. 297, 303-05, 96 S. Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed 563 (1955). As the Court

observed in McGowan, supra, 366 U.S. at 426, 81 S.Ct. at 1105, a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Moreover, where the state acts under the Twenty-first Amendment, the standard of review is even more forgiving. See LaRue, supra, 409 U.S. at 114, 93 S.Ct. at 395 ("the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.").

[8] Given these principles, the legislature's decision to exempt from a §16C veto innholders and premises located ten or more floors above street level appears sufficiently rational to satisfy

the dictates of equal protection analysis. With respect to innholders, the legislature could rationally conclude that most patrons of a liquor outlet located at an inn would be customers of the inn itself and hence less likely to venture outside of the inn to distrub nearby churches and schools. Likewise, the legislature could rationally believe that a distance of ten floors suffices to diminish the disturbance generated by a liquor outlet thus situated. In either case, it is not this court's duty to second-guess such determinations.

With respect to Grendel's second argument, the matter appears closer. But the mere possibility that one enjoying power under a statute might act arbitrarily is not enough to invalidate legislation on equal protection grounds.[13] In each of the cases cited by the plaintiff, for example, it was the arbitrary action of an official that constituted the violation of equal protection. In none of those cases was the statute itself overturned because of the potential for such arbitrary action. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed 220 (1886); Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964).

In Niemotko v. Maryland, 340 U.S. 268, 273, 71 S.Ct. 325, 328, 95 L.Ed. 267 (1951), also cited by the plaintiff, the Supreme Court reviewed an informal municipal licensing "practice" used to

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13/ As has been noted, supra, however, that possibility does provide grounds for due process and Establishment Clause challenges.

bar the use of a local park to Jehovah's Witnesses. The Court struck down the "practice" as violative of free speech and religion, but carefully limited its equal protection holding to the ruling that in the specific situation before the Court, the "practice" had been applied arbitrarily.

D. The State Exemption Defense.

Aside from its constitutional challenges, Grendel's also seeks to overturn §16C because of its alleged inconsistency with federal antitrust law, which is made controlling under the Supremacy Clause.[14/] Grendel's theory, in general outline, is that §16C creates a species of economic power which churches and private schools could exer-

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[14/] U.S. Const., art. VI.

cise in anticompetitive ways.[15/]

The issues before the court at this point arise from cross-motions for summary judgment aimed at the Commonwealth's assertion of a state exemption defense to Grendel's antitrust theory. Under Parker, supra, anticompetitive activities properly authorized and supervised by a state are immune to challenge under federal antitrust law. In Midcal, supra, 445 U.S. at 105, 100 S.Ct. at 943, a unanimous Supreme Court stated a two-part test for the establishment of Parker immunity: "[f]irst, the

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[15/] For example, church members who own liquor establishments or restaurants might exploit their churches' §16C veto power to disadvantage a competitor seeking to obtain a license. At this stage of the case, the court expresses no opinion as to the validity of such a theory and no findings as to the facts surrounding Grendel's application.

challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself," quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.).

Section 16C, of course, represents a clear articulation of a state policy in favor of a church or school veto over liquor license applications. The Parker test, however, requires more than a clear statement of a legislative purpose that incidentally affects competition. It requires instead a clear statement of policy in favor of the anticompetitive effects themselves. There is in this case no clear statement by the Commonwealth that the potential anticompetitive effects of §16C are legitimate, rational, or necessary in protecting centers of community activity from disturbance by liquor outlets.

Even were such a policy statement present, however, §16C does not involved the Commonwealth in sufficiently active supervision to warrant immunity under the state exemption doctrine. The simple fact is that "state authori[ty], approval, enouragement, or participation in restrictive private conduct confers no antitrust immunity." Cantor v. Detroit Edison, 428 U.S. 579, 592-93, 96 S.Ct. 3110, 3118, 49 L.Ed.2d 1141 (1976). Here, §16C does no more than approve or ratify such conduct, and hence cannot be regarded as the kind of direct state involvement required under Parker. Indeed, the Court in Midcal, supra, faced an analogous situation in which California ratified resale price maintenance schemes developed by private liquor dealers. In unanimously rejectig the proffer of a Parker immunity defense, the Midcal Court reemphasized the requirement that the state actively supervise the challenged private anti-competitive acts. Id. 445 U.S. at 105, 100 S.Ct. at 943.

[9] This court determines that §16C is not immune to an antitrust challenge. Because the Commonwealth has not clearly stated a policy in favor of §16C's potentially anticompetitive effects and because it has not actively supervised those effects, the state exemption doctrine does not apply.

III.

For the reasons described in this opinion, the court holds that Mass.Gen. Laws ch. 138, §16C violates the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment, but that it does not violate the Equal Protection Clause of the Fourteenth Amendment. The court also holds that the state exemption doctrine of Parker v. Brown, supra, does not preclude plaintiff from relief under federal antitrust law.

An order will issue.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellees.

CAMBRIDGE LICENSE COMMISSION, ET AL.,
Defendants, Appellants.

No. 80-1654

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellants.

Before Coffin, Chief Judge,
Campbell, Circuit Judge,
and Hoffman, * Senior District Judge.

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*Of the Eastern District of Virginia, sitting by designation.

MEMORANDUM AND ORDER

Entered May 18, 1981

Grendel's Petition for Rehearing merely presents further argument concerning matters that have been previously considered. Contrary to Grendel's intimations, the recent decision in Thomas v. Review Board of the Indiana Employment Security Division, 49 U.S.L.W. 4341 (April 6, 1981), is not an authority which, in respect to the present case, adds significantly to the precedent that was before us when our decision was rendered, nor do we think our decision conflicts in any way with the holding of the Supreme Court in Thomas. Grendel's other arguments do not convince us that the court has misapprehended or overlooked any substantial points of law or fact.

Petition denied.*

By the Court,

Clerk.

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*Chief Judge Coffin would allow the petition for rehearing for reasons stated in his dissenting opinion.

[cc: Messrs. Miller, Tribe and O'Conner.]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellees.

CAMBRIDGE LICENSE COMMISSION, ET AL.,
Defendants, Appellants.

No. 80-1654

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellants.

Before Coffin, *Chief Judge*
Campbell and Bownes, *Circuit Judges*.

CORRECTED
MEMORANDUM AND ORDER

Entered: May 18, 1981.

The petition for rehearing en banc is granted.

It is noted that Judge Breyer has recused himself. Judge Campbell notes that while on the merits he opposes granting said petition, he votes to grant the rehearing en banc in order to make it possible for the matter to be reviewed by the en banc court as desired by Chief Judge Coffin and Judge Bownes. See F.R.A.P. Rule 35(a).

These cases will stand submitted on the original briefs at the June, 1981 session. The Court reserves the right to require additional briefing.

By the Court

Clerk.

[cc: Messrs. Miller, Tribe and O'Conner.]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellees.

CAMBRIDGE LICENSE COMMISSION, ET AL.,
Defendants, Appellants.

No. 80-1654

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellants.

Before Coffin, Chief Judge
Campbell and Bownes, Circuit Judges.

JUDGMENT

Entered: July 28, 1981

These causes were submitted on briefs on rehearing en banc on appeals from the United States District Court for the District of Massachusetts.

Upon consideration thereof, it is now here ordered, adjudged, and decreed as follows: The judgment of this Court entered on April 7, 1981, is hereby vacated; and

The judgment of the District Court is affirmed.

By the Court:

Clerk

[cc: Messrs. Caruso and Tribe]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,

Plaintiff-Appellee,

v.

HERBERT N. GOODWIN, et al.,

Defendants-Appellees.

CAMBRIDGE LICENSE COMMISSION, et al.,

Defendants-Appellants.

Filed in Clerk's Office
Aug. 11, 4:33 PM'81
U.S. Court of Appeals
For the First Circuit

No. 80-1654

GRENDEL'S DEN, INC.,

Plaintiff-Appellee

v.

HERVERT N. GOODWIN, et al.,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the state defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10.2, the state defendants specify:

1. The parties taking this appeal are Herbert N. Goodwin, Fletcher H. Wiley, and John P. Larkin, as they are the members of the Massachusetts Alcoholic Beverages Control Commission, collectively referred to as the state defendants.

2. The state defendants appeal from the judgment of this Court entered July 28, 1981, which affirmed a judgment of the United States District Court of the

District of Massachusetts, holding Mass. G.L. c. 138, §16C unconstitutional.

3. The appeal is taken to the Supreme Court of the United States pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

By their attorneys,

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Dated: August 7, 1981

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellees.

CAMBRIDGE LICENSE COMMISSION, ET AL.,
Defendants, Appellants.

No. 80-1654

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,

v.

HERBERT N. GOODWIN, ET AL.,
Defendants, Appellants.

Filed in Clerk's Office
Aug. 12 3:29 PM '81
U.S. Court of Appeals
For the First Circuit

Before Coffin, Chief Judge
Campbell and Bownes, Circuit Judges.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Cambridge License Commission, one of the defendants-appellants above named, hereby appeals to the Supreme Court of the United States from the decision of this Court, dated July 28, 1981, affirming the order of the United States District Court (Tauro, D.J.), dated August 14, 1980 (495 F. Supp. 761), allowing plaintiff's motion for partial summary judgment.

This appeal is taken pursuant to 28 U.S.C. §1254.

Cambridge License Commission

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APPENDIX I

Joseph V. ARNO

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued Nov. 9, 1978.

Decided Jan. 12, 1979.

Robert M. Cohen, Boston, Jerome D. Groskind, Boston, with him, for plaintiff.

Paul W. Johnson, Asst. Atty. Gen., for defendant.

Before HENNESSEY, C. J., and BRAUCHER, WILKINS, LIACOS and ABRAMS, JJ.

LIACOS, Justice.

The plaintiff, Joseph V. Arno, challenges G.L. c.138, §16C,[1] as an improper, standardless delegation of legislative authority, and as violative of the establishment of religion clause of the First Amendment to the United States Constitution. We disagree with the plaintiff's characterizations, and hold the provision valid under both the State and Federal Constitutions.

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[1] The pertinent portion of c. 138, §16C, as amended by St. 1970, c. 192, §1, reads as follows: "Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located

(footnote continued)

The parties have stipulated to all the material facts. On July 16, 1975, the plaintiff applied to the Nantucket board of selectmen (board) for a liquor license for Arno's Restaurant, located at 41 Main Street (premises), Nantucket, Massachusetts. The restaurant is within

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(footnote continued)

within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto . . . ".

500 feet of the Centre Street United Methodist Church (church). A public hearing was held on the application on August 6, 1975. By a letter of that date, the recording steward of the church informed the board that the church's administrative board objected to the issuance of a liquor license to the plaintiff for the premises. In a letter dated August 7, 1975, the board notified the plaintiff of its denial of his application pursuant to G.L. c. 138, §16C, based on the church's written objection. A few days later, the plaintiff appealed pursuant to G.L. c. 138, §67, from the board's decision to the Alcoholic Beverages Control Commission (ABCC). At a hearing before the ABCC on August 28, 1975, the board introduced documents demonstrating that the church adminis-

trative board was the governing body of the church. The plaintiff presented no contrary evidence. On the same date, the ABCC affirmed the board's denial of the plaintiff's license application.

The plaintiff filed the complaint in this action on September 16, 1975, seeking judicial review pursuant to G.L. c. 30A, §14, of the ABCC decision. Having agreed to all material facts, the parties requested that the judge reserve and report the case to the Appeals Court. The judge reported the case to the Appeals Court pursuant to G.L. c. 231, §111. We transferred the case here on our own motion.

1. Delegation of legislative authority. This court has recognized as a general proposition that the Legis-

lature cannot delegate the general power to make laws, Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 420-423 (1973),[2] although it may delegate to a board or an individual officer the implementation of details of a legislative policy, so long as specific standards are supplied, Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 775-776 (1976)[3] The plaintiff urges us to apply these basic tenets to §16C, and to find it constitutionally defective. We decline that invitation. Rather, while affirming the principles espoused in the cases cited above, we find them inapposite to the statutory provision before us, for the reasons which follow.

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[2] The doctrine of nondelgations derives from art. 30 of our Declaration of Rights and from Part II, c. 1, §1, art. 4, of our Consitution. Arlington v. Board of Conciliation & Arbirtation, 370 Mass. 769, 775.

[3] In Arlington, we upheld the constitutionality of an act authorizing the use of an arbitration panel to resolve disputes, in certain circumstances, between employee organizations representing firefighters or police officers and the employing city, town or district. We found no improper delegation in that the

(footnote continued)

Statutes regulating the sale of intoxicating liquors have been accorded exceptional teatment by the courts.[4]

(footnote continued)

neutral arbitrator/chairman, whether classified as a "public" or a "private" person, was impartial and was required to apply detailed statutory standards. We also based our holding on the extensive safeguards against arbitrary action built into the statutory scheme.

[4] The Supreme Court in California v. LaRue, 409 U.S. 109, 114 (1972), remarked that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, wel-

(footnote continued)

The United States Supreme Court has stated that "[w]ithout doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put." Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939). Incident to the authority wholly to prohibit the sale of intoxicating liquors, the Legislature may permit sales subject to prescribed terms and conditions. Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956). The Legislature has established such terms and conditions in a scheme of regulation

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(footnote continued)

fare, and morals." See Trustees of Mortgage Trust of America v. Holland, 554 F.2d 237, 238 (5th Cir. 1977). See also Opinion of the Justices, 373 Mass. 888, 890-891, 893-894 (1977).

embodied in G.L. c. 138.[5]

Section 16C of G.L. c. 138 prohibits, with stated exceptions, the granting of a liquor license to premises located within a radius of 500 feet of a church or school if the governing body of that church or school[6] files a written objection to its issuance. It long has been acknowledged that a State, in the exercise of its expansive police powers with regard to the regulation of sales of alcoholic beverages, may enact valid laws prohibiting, without the possibility of waiver, such sales within specified distances of churches[7/] and other institutions sought to be protected. See Ford v. Easterling, 183 Miss. 575 (1938); State ex rel Dixie Inn, Inc. v. Miami, 156 Fla. 784 (1946); 45 Am.Jur.2d Intoxicating Liquors §140 (1969). These statutes have been upheld as rationally implementing a legislative determination that the welfare and safety of indi-

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[5] Among these terms are included the prohibition of the sale of alcoholic beverages except as authorized by this chapter (§2), and the delegation of authority for issuance of licenses to local licensing boards in cities and town voting to authorize sales (§15), subject to the prohibition of more than three licenses under the same ownership, the necessity of further approval by the ABCC (id.), and the imposition of license quotas (§17).

[6] General Laws c. 138, §16C, defines a church and a school as follows: "In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age."

[7/] What institutions qualify for consideration as churches in the context of such statutes has been a subject of frequent litigation. See 45 Am.Jur.2d Intoxicating Liquors §141 (1969); 59 A.L.R.2d 1439 (1958).

viduals attending these institutions would be served by such a zone of protection. Likewise, local zoning ordinances prohibiting the sale of intoxicating liquors within certain areas have been upheld. In Blackman v. Big Sandy, Tex. 507 F.2d 935, 936-937 (5th Cir. 1975), the court stated: "The City might be legitimately concerned about the presence of a liquor establishment and its accompanying traffic in the midst of homes, churches and a school. The Supreme Court has recently made clear that zoning decisions 'addressed to family needs' are permissible ones. 'The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people'. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 [1974]."

Accepting the premise that an absolute prohibition of new liquor licenses within a certain distance of a church constitutes a valid exercise of police power,[8] we turn to the improper delegation of power claims advanced by the plaintiff. A look at §16C in its historical context is useful here. At its inception, when §16C was inserted by St. 1954, c. 569, §1, it was a categorical ban akin to those discussed above: "Premises, except those of an innholder located within five hundred feet . . . of a church or school shall not be licensed for the sale of alcoholic beverages . . . ". Statute 1968, c. 435, modified the absolute proscription by permitting licenses within the 500-foot radius "if the governing body of such church or school assents in writing." Finally, St. 1970, c. 192, §1, substituted the present language which essentially shifts the burden of formal objection to the church or school, and relieves the applicant of the duty to gain assent.[9]

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[8] We discuss the propriety of such a statute, and of §16C, in the face of the First Amendment establishment of religion clause attack, infra.

The history of the statute demonstrates a progressive relaxation of licensing limitations against a backdrop of a legislative option of total prohibition. While seeking in part to facilitate the granting of licenses, the Legislature chose also to perserve, where appropriate, its legitimate police power objective of providing a zone of protection. The power to effectuate this goal is delegated in part,[10/] to churches loacted within 500 feet of the premises proposed to be licensed. As we pointed out in Connolly v. Alcoholic Beverages Control Comm'n, supra at 619, "[i]n dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers" (no invalid delegation of authority to the ABCC in leaving to it the power to approve or disapprove license applicants who had been approved by the local

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[9] See Governor's letter, 1970 House Doc. No. 5215.

[10/] The local licensing board and the ABCC both retain the authority to deny a license within the 500-foot radius even if they church chooses not to object. See, e.g., G.L. c. 138, §§12, 15.

board.)[11/] The authority delgated need not vest exclusively in public bodies in order to pass constitutional muster. Indeed, statutes making the granting of a liquor license conditional on the consent of, or the absence of an objection by, residents or property owners within a certain area in which the proposed establishment is to be operated have

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[11/] See Butler v. East Bridgewater, 330 Mass. 33, [illegible] (1953), where an enabling act permitted either local prohibition or regulation of the removal of soil from land not in public use. The town decided to "regulate" by issuing permits, and invested in the selectmen quasi judicial authority, without explicit standards, to pass on the application. We held that the delegation was permissible and that "this case is to be distinguished from cases where an attempt has been made to delegate to some official what pratically amounts to the unrestrained power of life or death over the right to engage in some lawful, useful, and generally harmless occupation not otherwise prohibited."

been uniformly upheld. See Beacon Liquors v. Martin, 279 Ky. 468, 131 S.W.2d 446 (1939); 45 Am.Jur.2d Intoxicating Liquors §156 (1969). Likewise, the Legislature's delegation in §16C of a veto power to the institutions most directly representing the interests it seeks to protect falls within permissible constitutional limits.

Reference to the case of Cusack Co. v. Chicago, 242 U.S. 526 (1917), and its progeny,[12] is especially instructive. In Cusack, an ordinance which prohibited specific uses, but permitted waiver of the restrictions with the consent of a majority of the parties most affected, survived a claim of invalid delegation of legislative power. The distilled essence of Cusack, as construed in the majority of cases, is that if the effect of a consent provision is to legislate a restriction it is invalid,[13/] but if it serves merely to permit the waiver of a restriction created by the legislative body, which has provided for such a waiver, it is upheld. See O'Brien v. St. Paul, 285 Minn. 478 (1969); Robwood Advertising Assocs. v. Nashua, 102 N.H.

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[12] See, e.g. Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363 (E.D. Mich. 1974), aff'd on other grounds sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Inspector of Bldgs, of Lowell v. Stoklosa, 250 Mass. 52 (1924); Cross v. Bilett, 122 Colo. 278 (1950); State ex rel. Standard Oil Co. v. Combs, 129 Ohio St. 251 (1935).

[13/] See Eubank v. Richmond, 226 U.S. 137 (1912).

215 (1959); 21 A.L.R.2d 551 (1952).[14] We regard the current §16C as failing within the latter category. Clearly, the 1968 version, which prohibited licensing within the 500-foot radius but provided for written waiver by the church, landed squarely within the ambit of the *Cusack* rule. The 1970 amendment created no material distinction for the purpose of analyzing the delegation

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14/ *See also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), a decision of the United States Supreme Court handed down after oral argument in the instant case. In that case, the statutory right of an existing retail motor vehicle franchisee to protest the establishment of a competing dealership was upheld in the face of an attack alleging, inter alia, deprivation of due process and impermissible delegation of State power to private citizens. The exercise of the right described had the effect of automatically triggering a prohibition of the proposed dealership until the New Motor Vehicle Board gives a hearing as to whether or not it ought to be permitted.

issue. The current provision does not invest the church with a new, expanded power to legislate a prohibition. It merely shifts to the church the burden of objecting, while retaining the essential legislative mandate that no license be granted within the protected area in the face of a nonconsenting church.

We hold, therefore, that §16C does not affront the Massachusetts Constitution. As a corollary, we hold that it comports with the due process clause of the Fourteenth Amendment to the Federal Constitution, contrary to the assertions of the plaintiff. Due process does not require, as the plaintiff suggests, the promulgation of an elaborate scheme of standards governing decision making by the church. As an institution representing interests benefited by a valid police power protection, the church may waive that protection or not, in its discretion, without running afoul of the due process clause. Cf. Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363 (E.D. Mich. 1974), aff'd on other grounds sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). What due process does require, however, and what is available by statute,[15] is the opportunity for a hearing with respect to such questions as whether the objecting institution qualifies as a "church" for the purposes of the statute, whether it is within the statutorily protected zone of 500 feet, and whether the written objection was duly authorized by the appropriate "governing body" of the church.[16/] As to questions such as these, an initial hearing and adequate opportunity for administrative and judicial review are available.

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[15] See G.L. c. 138 §§15, 15A, 67 and G.L. c. 30A, §14.

2. The First Amendment establishment of religion clause. The plaintiff also urges us to invalidate §16C on the alternative ground that it violates the establishment of religion clause of the First Amendment to the United States Constitution.[17/] While we recognize

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[16/] *See generally* G.L. c. 67. These questions are not in issue in this proceeding as the plaintiff does not contest that the written objection filed was authorized by the governng body of a church within 500 feet of the locus.

[17/] The clause states: "Congress shall make no law respecting an establishment of religion . . .". It has been held to be applicable to the States through the Fourteenth Amendment. *Engel v. Vitale*, 370 U.S. 421 (1962).

that the plaintiff raises an issue which falls within an "extraordinarily sensitive area of constitutional law,"[18/] we also note that the "hermetic separation"[19/] of church and State is an impossibility which the Constitution has never required. The test which §16C must pass is set forth in Wolman v. Walter, 433 U.S. 229, 236 (1977): "In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." Section 16[illegible]

[18/] Lemon v. Kurt[illegible]n, 403 U.S. 602, 612, (1971).

[19/] Roemer v. Bo[illegible] Pub. Works of Maryland, 426 U.S. [illegible], 746 (1976).

withstands scrutiny with respect to each consideration.

As we discussed earlier in this opinion, the provision for a zone of protection from liquor establishments sought to be licensed within a given radius of a church or a school is a valid exercise of police power,[20] in that it seeks to safeguard the health and welfare of persons attending religious and nonreligious activities at such places. While §16C does provide special protection for churches and schools,[21] we view its purpose as secular, and its principal effect as neither sponsorship of nor hostility toward religion. The United States Supreme Court has upheld in the face of establishment clause attacks: a statute granting a property tax exemption to religious organizations, along with other cultural and charitable groups, Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664 (1970); Maryland's Sunday closing laws, McGowan v. Maryland, 366 U.S. 420 (1961); and State reimbursement of transportation costs to parents of parochial school students, even though the children might not have attended the church-affiliated school in the absence of the public program, Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947). Just as these and other Supreme Court cases indicate tolerence of the incidental benefits which religious institutions reap by virtue of programs generated from secular concerns, so do we find acceptable both the goals and effects of §16C.[22/]

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[20] See discussion _supra at_ 87-89. _See also_ _Horne v. Hernando County_, 297 So.2d 606, 607 (Fla. Dist. Ct. App. 1974).

[21] The legislature, in its judgment, may extend this benefit on a selective basis. _Zayre Corp. v. Attorney Gen._, 372 Mass. 423, 433-434 (1977). _Cf._ _Williamson v. Lee Optical of Okla., Inc._, 348 U.S. 483, 489 (1955).

Finally, we find that while §16C inevitably occasions some degree of State involvement with religion, that involvement does not rise to the level of "ex-

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[22/] See Wiles v. Michigan Liquor Control Comm'n, 59 Mich. App. 321, 229 N.W.2d 434 (1975), upholding in the face of an establishment clause attack a statute essentially identical to G.L. c. 138 §16C. The court acknowleged there that the church derived no economic benefit from the rule, and that the statute neither encouraged nor discouraged people from attending religious services. Even if we were to find that the application of §16C had the subsidiary effect of fostering increased participation in church activities such an effect would fall within the boundaries, albeit shifting and not fully explored, which the First Amendment prescribes. Cf. Bloom v. School Comm. of Springfield, 376 Mass. 35 (1978).

cessive entanglement." The governing body of a church may file an objection to the granting of a license, and that objection is subject to limited scrutiny.[23/] The State-church interaction engendered by these restricted procedures represents far less involvement than that created by the "sustained and detailed administrative relationships for enforcement of statutory or administrative standards" which the Supreme Court regards so warily.[24/]

[23/] See discussion *supra* at 90.

[24/] *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 675 (1970). *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (ongoing State surveillance of subsidized "secular" classes to assure nonreligious content, and State inspection of parochial school records in order to evaluate the amounts allocated to secular education contrasted with religious activity, found excessively entangling).

For the reason stated, we uphold the validity under both the Masschusetts and United States Constitutions of that portion of G.L. c. 138, §16C, challenged here. The case is remanded to the Superior Court for entry of judgment in accordance with this opinion.

So ordered.

Joint Appendix

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Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXAND[illegible] STEVAS,
CLER

No. 81-878

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS and
SUSAN R. BENDER as they are the members
of the MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, and the CAMBRIDGE
LICENSE COMMISSION,

Appellants,

v.

GRENDEL'S DEN, INC.,

Appellee.

ON APPEAL FROM AN *EN BANC* JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

[Listing continued on inside cover.]

APPEAL DOCKETED NOVEMBER 12, 1981
PROBABLE JURISDICTION NOTED
JANUARY 11, 1982

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC.,
Plaintiff,

v.

HERBERT N. GOODWIN, FLETCHER H. WILEY,
and ALBERT F. CULLEN, JR., sued
in their official capacities
as Members of the Alcoholic
Beverages Control Commission
of Massachusetts, CAMBRIDGE
LICENSING COMMISSION,
Defendants.

CAUSE: CIVIL RIGHTS

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1977		
Nov. 7	01	Complaint filed, summons issued.
Dec. 21	03	Answer of Dfts., filed c/s.
1978		
Apr.	09	Amended complaint filed, c/s.

DATE	NR	PROCEEDINGS
May 10	17	Motion of defts' Goodwin, Wiley and Cullen to dismiss amended complaint, filed, c/s.
Nov. 2	21	Parties motion for continuance filed.
Nov. 2		TAURO, D.J., re motion for continuance: motion "Allowed." Copies to counsel.
1979		
Sept. 17	22	D's motion to dismiss, filed c/s.
Sept. 19	23	Motion of Cambridge License Comm etal [sic] to dismiss the amended complaint, filed cs.
1980		
Jan. 14		TAURO, D.J., Hearing re #22, 23; argument; mtns 23, 23 DENIED; cc/cl.
Apr. 16	35	State Ds' mtn for partial summary judgment, filed.

DATE	NR	PROCEEDINGS
Apr. 16	36	Cambridge Licensing's mtn for partial summ judgment, filed.
	37	P's mtn for partial summ judgment, filed.
	38	Agreed statement of parties of contested claims, filed.
	39	Statement of agreed facts, filed.
June 9		TAURO, D.J. Case called for hearing on #35, 36 and 37, cross motions for partial summary judgment; argument; matter taken under advisment.
Aug. 14		TAURO, D.J. OPINION ISSUED: ". . . For the reasons described in this opinion, the court holds that Mass. Gen. Laws ch. 138, Section 16C violates the Due Process Clause of the 14th Amendment and the Establishment Clause of the First Amendment, but . . . not . . . the Equal Protection Clause of the 14th Amendment. The court also holds that the state exemption doctrine of

DATE	NR	PROCEEDINGS
Aug. 14	cont.	*Parker* v. *Brown*, *supra*, does not preclude P from relief under federal antitrust law. An order will issue." Entered, filed, cc/cl.
		TAURO, D.J. ORDER ENTERED: "For the reasons set forth in an opinion issued this date, P's mtn for partial summary judgment is ALLOWED." Entered, filed, cc/cl.
Sept. 5		TAURO, D.J. JUDGMENT ENTERED: ". . . ORDERED AND ADJUDGED that Mass. Gen. Laws ch. 138, Section 16C and its enforcement by defendants are hereby declared void and in violation of the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment to the Constitution . . . It is further ORDERED pursuant to 28 U.S.C. 1292(b) that

DATE	NR	PROCEEDINGS
Sept. 5	cont.	the Court's order entered on August 14, 1980 is amended to include the following: (i) that defendants' motion to dismiss the antitrust claims under the state action exemption doctrine of Parker v. Brown, 317 U.S. (1942) is denied, and (ii) that in the Court's opinion such order involves a controlling question of law . . . and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Filed, cc/cl.
Sept. 11	54	Notice of Appeal, filed F.F. paid (c/s) (of Cambridge License Commission Members), of Judgment of 9/5/80.
Sept. 15	55	Notice of appeal of state Ds Goodwin, Wiley, and Larkin, of Judgment of 9/5/80.

DATE	NR	PROCEEDINGS
Sept. 15	56	State Ds' mtn for stay of judgment pending appeal, filed, c/s, ref. to TAURO.
Sept. 18		TAURO, D.J. #56 ALLOWED; cc/cl.

(B) Docket Entries of the United States Court of Appeals for the First Circuit

DATE	FILINGS-PROCEEDINGS
1980	
Nov. 3	Heard by Coffin, Campbell & Hoffman, J.J. [lam]
1981	
Apr. 7	JUDGMENT: The judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with the opinion filed this day. Opinion of the Court by Campbell, Circuit Judge and dissenting opinion by Coffin, Chief Judge. Notices mailed. [jc]
Apr. 17	Petition for rehearing and rehearing en banc received and filed. [jc]

May 18	MEMO & ORDER (Coffin, Campbell and Hoffman J.J.) denying petition rehearing. Notices mailed. [jc]
	MEMO & ORDER (Coffin, Campbell and Bownes, J.J.) granting petition for rehearing en banc and submitting these cases on the original briefs at the June, 1981 session. The Court reserves the right to require additional briefing. Notices mailed. [jc]
July 28	Judgment: The judgment of this court entered on April 7, 1981, is hereby vacated; the judgment of the district court is affirmed. Opinion of the Court by Coffin, Ch. J., dissenting opinion by Campbell, J. Notices mailed. [lam] (on rehearing)
Aug. 11	Application for a stay pending appeal to the United States Supreme Court, State Defendants' Memorandum in support of their motion for a stay, filed, Notice of appeal to the Supreme Court of the United States, filed. Notices mailed. (mn)
Aug. 12	Notice of appeal to the Supreme Court of the United States for the City of Cambridge, received and filed. Notices mailed. (mn)

Nov. 20	Notice of appeal to the Supreme Court (81-878) filed. Nov. 12, 1981. [lam]
1982	
Jan. 14	Order of Supreme Court noting probable jurisdiction (81-878) Jan. 11, 1982 filed

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, :
INC., :
:
Plaintiff, : Civil Action
: No. 77-3418-T
v. :
:
HERBERT N. GOODWIN, :
FLETCHER H. WILEY, :
and ALBERT F. : AMENDED
CULLEN, JR., sued : COMPLAINT
in their Official :
Capacities as :
Members of the :
Alcoholic Beverages :
Control Commission :
of Massachusetts; :
CAMBRIDGE LICENSE :
COMMISSION; :
CHAIRPERSON OF THE :
CAMBRIDGE LICENSE :
COMMISSION; and :
LEO DAVENPORT and :
WILLIAM CRIMMINS, :
sued in their :
Official Capacities :
as Members of the :
Cambridge License :
Commission. :
:

Plaintiff, through undersigned counsel, states the following in support of its complaint:

1. This action arises under the First and Fourteenth Amendments to the Constitution of the United States, 15 U.S.C. §§1 and 2, and 42 U.S.C. §1983. Jurisdiction is conferred by 15 U.S.C. §15 and 28 U.S.C. §§1331 and 1343. This Court has pendent jurisdiction to hear and decide plaintiff's claims of state-created rights.

2. The amount in controversy exceed $10,000.00, exclusive of interest and costs.

3. Plaintiff is a corporation chartered under the laws of Massachusetts and has since 1971 owned and operated Grendel's Den, a restaurant establishment on leased premises at 89 Winthrop Street, in the Harvard Square area of Cambridge, Massachusetts.

4.a. Defendants Herbert N. Goodwin, Fletcher H. Wiley and Albert F. Cullen, Jr. are sued in their official capacities as the members of the Alcoholic Beverages Control Commission of Massachusetts (hereinafter the "ABCC").

b. Defendant Cambridge License Commission (hereinafter "CLC") is charged with the various duties in granting, rejecting, transfering [sic] and revoking alcoholic beverage licenses under M.G.L. c.138 §§12-16, 23.

c. Defendants Chairperson of the Cambridge License Commission, Leo Davenport and William Crimmins are sued in their official capacities as members of the Cambridge License Commission.

5. On May 13, 1977, pursuant to a purchase agreement with plaintiff,

Scorpio's Inc., holder of an All Alcoholic Restaurant License for premises at 1080 Massachusetts Avenue, Cambridge, applied to the CLC for approval to transfer its license to plaintiff for its Harvard Square premises.

6. In a letter dated May 25, 1977, the Holy Cross Armenian Catholic Parish (hereinafter the "Parish"), located at 100 Mt. Auburn Street, Cambridge, Massachusetts, advised CLC that it objected to the transfer of any liquor license to Grendel's Den [sic], Inc.

7. The Parish occupies an all brick building. The public entrance to the building abuts directly on the sidewalk of Mt. Auburn Street, one of Cambridge's most heavily trafficked thoroughfares,

at a point between two of Harvard Square's busiest commercial intersections.

8.a. M.G.L. c.138, §16C delegates to any and every church, regardless of the character of its geographical location, its building design, its construction or its activities, an absolute, unfettered, and standardless veto power of the acquisition of a liquor license by any business within a 500-foot radius of the church.

b. M.G.L. c. 138, §16C grants an exemption from a church's veto power to innholders and businesses conducted ten or more stories above street level.

c. M.G.L. c. 138, §16C authorizes, permits and enables a church to use its veto power to further the commercial interests of its members or contributors by vetoing the granting of liquor licenses to their competitors.

d. M.G.L. c. 138, §16C authorizes, permits and enables a church to use its veto power to further its own financial interests by threatening or otherwise conditioning exercise of its veto power to induce, coerce or otherwise obtain "contributions" to it of money or other things of value from applicants seeking alcoholic beverage licenses for premises within the church's 500-foot radius.

9. Since the Grendel's Den restaurant was established in 1971, the Parish has continuously objected to plaintiff's acquiring a liquor license.

10. During the period between the establishment of the Grendel's Den restaurant in 1971 and the present, the Parish has allowed at least ten other restaurants, bars and liquor stores within its 500-foot radius of control to acquire liquor licenses by transfer or otherwise.

11. Grendel's Den exists within the 500-foot radius of the University Lutheran Church, located at 66 Winthrop Street, Cambridge, Massachusetts, and despite the fact that the Grendel's Den entrance is closer to the entrance of the University Lutheran Church than to the Parish entrance, the University Lutheran Church has never interposed an objection to plaintiff's acquiring a liquor license.

12. On information and belief, certain congregation members and/or contributors to the Parish have, because of their contributions to the Parish or otherwise, substantial influence in the Parish governing board, and have exercised that influence to prevent plaintiff from acquiring a liquor license which would enable plaintiff to compete more effectively with the liquor-licensed restaurants owned by these members in the Harvard Square area.

13. On May 31, 1977, the CLC, acting pursuant to the mandate of M.G.L. c. 138, §16C, denied the application for transfer of Scorpio's license to plaintiff expressly and solely because of the objection filed by the Parish.

14. On September 8, 1977, defendants, acting as the ABCC, sustained the CLC denial solely and expressly because of the "absolute veto" entered by the Parish. (A copy of the ABCC decision of September 8, 1977, is annexed and incorporated as Exhibit A to this Complaint.)

15. As a result of the ABCC decision and the absolute veto power wielded by the Parish under M.G.L. c. 138, §16C, preventing plaintiff from acquiring a liquor license, plaintiff has been placed in a severely disadvantageous competitive position in relation to comparable restaurants in the Harvard Square area, all of which have liquor licenses.

16. As a result of the ABCC decision and the absolute veto power wielded by the Parish under M.G.L. c. 138, §16C,

preventing plaintiff from acquiring a liquor license, plaintiff has lost substantial business and revenues, and the continued quality and distinctive contribution to the Harvard Square area of Grendel's Den is seriously threatened by these losses.

17. M.G.L. c. 138, §16C, as enforced and applied by defendants, delegates an absolute, unfettered and standardless veto power to churches in violation of the Constitution's First Amendment prohibition against the establishment of religion, the Fourteenth Amendment guarantees of due process and equal protection of the law, and the Constitution and laws of Massachusetts.

18. M.G.L. c. 138, §16C, on its face and as applied, discriminates irrationally and unreasonably against restaurants like plaintiff's and in favor of innholders and licensed businesses ten or more stories above ground level in violation of the equal protection and due process guarantees of the United States and Massachusetts Constitutions.

19. The denial of a liquor license by defendants does not rationally serve any legitimate state interest, and therefore is arbitrary, capricious and discriminatory in violation of the Constitution's First Amendment prohibition against the establishment of religion, the Fourteenth Amendment guarantees of due process and equal protection of the

law, and the Constitution and laws of Massachusetts.

20. On its face and as applied, M.G.L. c. 138, §16C authorizes, approves, affects, permits, effectuates, and implements private agreements and actions to employ the church veto power in restraint of free trade and commerce in violation of the Sherman Act, 15 U.S.C. §§1 and 2, which has preemptive status over M.G.L. c. 138, §16C by virtue of the Supremacy Clause of Article VI of the Constitution.

21. As a direct result of the veto power delegated to the Parish by M.G.L. c. 138, §16C, and defendants' enforcement of that veto, plaintiff is suffering serious and irreparable injury, and, unless this Court grants the relief

requested below, such serious and irreparable injury will continue to the point of preventing plaintiff from operating Grendel's Den as a high quality restaurant.

WHEREFORE, plaintiff respectfully requests that this Court enter a judgment.

1. Declaring M.G.L. c. 138, §16C unconstitutional on its face and as applied in violation of the Constitution's First Amendment prohibition against the establishment of religion, the Fourteenth Amendment guarantees of due process and equal protection of the law, and the Constitution and laws of Massachusetts;

2. Declaring M.G.L. c. 138, §16C, on its face and as applied to affect, authorize, approve, permit, effectuate,

or implement private agreements and actions to employ the church veto power in restraint of free trade and commerce in violation of the Sherman Act, 15 U.S.C. §§1 and 2, and the Supremacy Clause of Article VI of the Constitution.

3. Enjoining defendants from enforcing M.G.L. c. 138, §16C on its face and applied in violation of the Constitution's First Amendment prohibition against the establishment of religion, the Fourteenth Amendment guarantees of due process and equal protection of the law, the Sherman Act and the Constitution's Supremacy Clause, and the Massachusetts Constitution;

4. Directing defendants to authorize transfer of an alcoholic beverage license to plaintiff for his Grendel's Den premises; and

5. Granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

David Rosenberg
ROSENBERG, BAKER & FINE
133 Mt. Auburn STreet
Cambridge, MA 02138
(617) 354-2937

Attorneys for Plaintiff

Dated: March , 1978

September 8, 1977

IN RE: Scorpio's Inc.
1080 Mass. Ave.
Cambridge

DECISION

This matter came on for hearing before the Commission on September 8, 1977 on the appeal of Scorpio's Inc. the holder of an all alcoholic Restaurant license for premises located at 1080 Massachusetts Avenue in Cambridge, from the action of the Cambridge Licensing Board in denying the application to transfer said license to Grendel's Den, Inc. at 89 Winthrop Street in said Cambridge.

On the basis of this hearing, the Commission upholds the actionof [sic] the local board on the grounds that the governing body of the church objected to the license ofthe [sic] premises under the provisions of Chapter 138, Section 16C and this represents an absolute veto. We find that the church's objection under Seciton [sic] 16C was the only basis on which the transfer was denied.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Herbert N. Goodwin, Chairman

Fletcher H. Wiley, Commissioner

HNG/dem/cc:
Licensing Board
John J. Cambell, Atty.
file

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC.,
Plaintiff

v.

HERBERT N. GOODWIN,
et al.

Defendants.

STATE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

The defendants, Herbert N. Goodwin, Fletcher H. Wiley, and Albert F. Cullen, as members of the Alcoholic Beverages Control Commission (A.B.C.C.) (State Defendants) move that the Complaint be dismissed for the following reasons:

1. The plaintiff fails to state a claim upon which relief can be granted under the Sherman Act in that

(a) the State Defendants are exempt from the Sherman Act under the doctrine of Parker v. Brown, 317 U.S. 341 (1943);

(b) the Complaint does not aver that the acts complained of were in interstate commerce;

(c) as alleged in the Complaint (¶ 14), the State Defendants acted "solely and expressly" on the basis of the exercise of the "'absolute veto'" under G.L. c. 138, § 16C by the church and not as the result of a contract, combination, or conspiracy proscribed by the Sherman Act, 15 U.S.C. § 1; and

(d) the regulation of commerce by the State Defendants is protected by the Tenth and Twenty-first Amendments to the United States Constitution.

2. The plaintiff's claims under the First and Fourteenth Amendments to the United States Constitution and the Massachusetts Constitution fail to state a claim upon which relief can be granted.

3. The Court, as a matter of comity, should abstain from hearing the plaintiff's claim in that

(a) two actions challenging the constitutionality of G.L. c. 138, § 16C are pending before the Massachusetts appellate courts (Joseph V. Arno v. Herbert N. Goodwin, Supreme Judicial Ct. No. 1421; Arthur I. Samel v. The City of Pittsfield Licensing Board, Appeals Ct. No. 78-75);

(b) G.L. c. 138, § 16C is part of a comprehensive state regulatory scheme and has not been construed by the state courts, and the construction, as applied to the facts alleged in this case, might obviate the need for decision of the federal constitutional issues raised by the plaintiff; and

(c) the plaintiff failed to present at the hearing before the A.B.C.C., the facts or the interpretation of G.L. c. 138, §16C relied on in this lawsuit, which are issues never decided by the A.B.C.C. or the state courts.

4. The Court, as a matter of comity or in the exercise of its discretion under the pendant jurisdiction doctrine, should decline to hear the state constitutional questions and questions of construction of a state statute advanced by the plaintiff in this lawsuit.

5. The Court lacks jurisdiction over the subject matter under the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity.

6. The Court lacks jurisdiction over the subject matter under the Twenty-first and Tenth Amendments to the United States Constitution.

Request for Briefing and Argument

The State Defendants request an opportunity to file a brief and present oral argument in support of their Motion to Dismiss the Amended Complaint.

By their Attorney,

John E. Bowman, Jr.
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
Tel: (617) 727-1010

Dated: May 8, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

DEFENDANT'S ANSWERS TO INTERROGATORIES

The defendant Alcoholic Beverage Control Commission (A.B.C.C.) answers the Interrogatories propounded by the plaintiff as follows:

1-10 and 14. Objection: The information requested in Interrogatories 1 through 10 and 14 is unduly burdensome and expensive for the A.B.C.C. to provide in the present form in that the

A.B.C.C.'s records do not disclose which licensed premises are within 500 feet of the Parish, and this information is equally available to the plaintiff.

By agreement of counsel, the plaintiff will submit to the A.B.C.C. a list of street addresses which the plaintiff reasonably believes to be within 500 feet of the Parish. The A.B.C.C. will then review its records and submit an appropriate response to the foregoing Interrogatories.

11. Interrogatory: Do defendants contend and is it their position in this case that an objection filed by a church or school under M.G.L. c. 138, § 16C bars approval of a license for the sale of alcoholic beverages notwithstanding that the reason for the objection is

a. that the license applicant is Black?

b. that the license applicant is Jewish?

c. that the license applicant is a woman?

d. that the license applicant is not Catholic?

e. that the license applicant is Irish?

f. that the license applicant is not a citizen of the United States?

g. that the license applicant is a member of the Democratic Party?

h. that the license applicant voted for President Carter?

i. that the license applicant has refused to donate money to the church or school?

j. that the license applicant's last name begins with the letter "A"?

k. a matter of random selection?

l. to prevent the license applicant from competing with a business licensed to sell alcoholic beverages owned by a member of the church's governing board or a person of influence in its congregation?

m. the result of personal, political, social, religious, racial, or business retaliation, vindictivenss, or animosity?

n. based on false accusations, misleading, incomplete or inaccurate information, or unverified or unsupportable assumptions?

o. a pay-off by a competitor of the license applicant?

Objection: The question is hypothetical and calls for speculation, conjecture, or mental impressions and is subject to a privilege. The question also asks for a conclusion of law on a matter never passed upon by the A.B.C.C. Further, the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Answer: Without waiving the foregoing Objection, G.L. c. 138, § 16C, as applied by the A.B.C.C., does not require the governing body of a church to state any reason for its objection to the issuance of a license to sell alcoholic beverages within a five hundred (500) foot radius. To the best of my knowledge, the A.B.C.C. has never considered a case under G.L. c. 138, § 16C in which the reasons set forth in Interrogatory 11 have been advanced as a basis for invalidating a church's objection. Grendel's Den did not, at the hearing held before the A.B.C.C. in this case, offer any evidence on the reasons for the objection filed by the Holy Cross Armenian Catholic Parish.

12. Interrogatory: Do defendants contend and is it their position in this case that the objection filed by the Parish bars plaintiff from obtaining a license to sell alcoholic beverages in his restaurant regardless of what reason the Parish had for filing the objection and even if such reason were

a. racial animosity?

b. religious animosity?

c. ethnic animosity?

d. animosity toward plaintiff's sex?

e. political animosity?

f. retaliation against plaintiff because he does not belong to the Parish?

g. retaliation against plaintiff because he has not made donations to the Parish?

h. the result of personal animosity toward plaintiff?

i. the result of spurious assumptions, unfounded accusations, and false information and about the operation of plaintiff's restaurant?

j. the result of influence exerted or a pay-off by a restaurant competitor of plaintiff's?

Objection: The question is hypothetical and calls for speculation, conjecture, or mental impressions and is subject to a privilege. The question also asks for a conclusion of law on a matter never passed upon by the A.B.C.C. Further, the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Answer: Without waiving the foregoing Objection, G.L. c. 138, & 16C, as applied by the A.B.C.C., does not require the governing body of a church to state any reason for its objection to the issuance of a license to sell alcoholic beverages within a five hundred (500) foot radius. To the best of my knowledge, the A.B.C.C. has never considered a case under G.L. c. 138, § 16C in which the reasons set forth in Interrogatory 11 have been advanced as a basis for invalidating a church's objection. Grendel's Den did not, at the hearing held before the A.B.C.C. in this case, offer any evidence on the reasons for the objection filed by the Holy Cross Armenian Catholic Parish.

13. Interrogatory: Do defendants contend and is it their position in this case that plaintiff is not entitled to a hearing before the Commission for the purpose of establishing that the

Parish's objection was filed for illegitimate and unjustified reasons, such as those described in parts a-j of interrogatory "12"?

Answer: No.

Answers signed under the penalties of perjury this 26th day of April, 1978.

John P. Larkin
Chairman

Objections signed this 28th day of April, 1978.

John E. Bowman, Jr.
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 77-3418-T

* * * * * * * * * * *

GRENDEL'S DEN, INC.

V

HERBERT N. GOODWIN, ET AL.

* * * * * * * * * * *

MOTION OF CAMBRIDGE LICENSE COMMISSION, CHAIRPERSON OF THE CAMBRIDGE LICENSE COMMISSION, LEO DAVENPORT AND WILLIAM CRIMMINS TO DISMISS THE AMENDED COMPLAINT

The Defendants, Cambridge License Commission, Chairperson of the Cambridge License Commission, Leo Davenport and William Crimmins, move that the Complaint be dismissed for the following reasons:

1. The Supreme Judicial Court of Massachusetts held that the constitutionality of General Laws, Chapter

138, section 16C was valid under both the Massachusetts and U.S. Constitutions in that:

a. statute prohibiting granting liquor license to premises located within a radius of 500 feet of church or school if governing body of church or school files written objection to issuance of the license does not invest churches with new, expanded power to legislate a prohibition, but merely shifts to church burden of objecting while retaining essential legislative mandate that no license be granted within the protected area in face of nonconsenting church, and thus such statute was not impermissible delegation of legislative authority;

b. the statute did not violate due process;

c. the statute is valid exercise of police power, and

d. statute did not violate establishment clause of First Amendment.

See Joseph V. Arno v. Alcoholic Beverages Control Commission, 384 N.E. 2d 1223 (Mass.) attached.

2. The Plaintiff fails to state a claim upon which relief can be granted under the Sherman Act in that the City defendants are exempt from the Sherman Act under the doctrine of Parker v. Brown, 317 U.S. 341 (1943) attached.

By their attorney,

Michael C. Costello
Assistant City Solicitor
Law Department, City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
498-9020
September 17, 1979

[certificate of service omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT W. [sic] GOODWIN, ET AL., Defendant	CIVIL ACTION NO. 77-3418-T

MOTION TO DISMISS

The state defendants suggest, pursuant to Fed. R. Civ. P., Rule 12, that the Court lacks jurisdiction over the subject matter of the amended complaint in this action, and they therefore move that the Court order the amended complaint against them dismissed.

As grounds for their motion defendants state that Plaintiff has failed to avail itself of the state judicial remedies available to it under Mass. Gen. Law c. 30A, § 14. Thus, it has not exhausted its state remedies as required by the Supreme Court. See, Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

By their attorney,

FRANCIS X. BELLOTTI

Thomas Miller
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts
727-1034

Dated: September 17, 1979

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC.,

Plaintiff

v.

HERBERT N. GOODWIN, ET AL.,

Defendants

CIVIL ACTION
NO. 77-3418-T

AGREED STATEMENT OF CONTESTED CLAIMS

The parties to this action stipulate and agree for the purpose of this litigation and no other, that the contested claims raised by the plaintiff's complaint are:

1. Whether or not plaintiff's requests for relief are precluded by the doctrine of Parker v. Brown, 317 U.S. 341 (1943);

2. Whether or not M.G.L. c. 138, §16C

violates the Establishment Clause of the First Amendment to the United States Constitution;

3. Whether or not M.G.L. c. 138, §16C violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

4. Whether or not M.G.L. c. 138, §16C violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The question of whether or not the church in fact exercised its powers under M.G.L. c. 138, §16C in an arbitrary or otherwise discriminatory manner was raised by plaintiff's complaint. By agreement, this issue has not been included within the scope of the present motions for partial summary judgments.

Should the Court be concerned that the motion for partial summary judgment cannot produce an appealable final judgment on the state action defense, the parties request that the court certify the question for appeal under 28 U.S.C. 1292(b).

Agreed to this day April 14, 1980

David Rosenberg Attorney for the Plaintiff Langdell Hall Cambridge, MA 02138	Gerald J. Caruso Attorney for the Commission Assistant Attorney General Government Bureau One Ashburton Place Boston, MA 02108 (617) 727-1022
Laurence H. Tribe Griswold Hall Cambridge, MA	Michael Costello Attorney for the CLC City Hall Cambridge, MA 02139

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

STATEMENT OF AGREED FACTS

The parties to this action stipulate and agree, for purposes of this litigation and no other, that the facts contained in this statement may be considered by the Court to be true. The documents referred to in this statement and the documents attached to this statement as Exhibits A through F may be considered by the Court to be authentic and genuine.

1. The plaintiff is a corporation chartered under the laws of Massachusetts and has since 1971 owned and operated a restaurant establishment on leased premises at 89 Winthrop Street in the Harvard Square area of Cambridge, Massachusetts.

2. Harvard Square is a world renowned business and entertainment center in Cambridge. Within the 500-foot radial domain of the Holy Cross Church there are at least twenty-six licensed premises. See Exhibit F.

3. The defendants Herbert N. Goodwin, Fletcher H. Wiley, and John Larkin are members of the Massachusetts Alcoholic Beverages Control Commission (hereinafter the Commission) and are sued in their official capacity.

4. The defendants Leo Davenport, Mary E. Colnan, and Daniel Reagan are members of the Cambridge License Commission (hereinafter CLC) and are sued in their official capacity.

5. On May 13, 1977, pursuant to a purchase agreement with the plaintiff, Scorpio's Inc., a holder of an All Alcoholic Restaurant License for the premises at 1080 Massachusetts Avenue, Cambridge, applied to the CLC for approval to transfer its license to plaintiff.

6. Notice of the transfer application was duly published in a local newspaper and, pursuant to M.G.L. c. 138, §15A, notice of the publication was given to all abutting property owners, and all schools, hospitals, and churches within a 500 ft. radius of Grendel's.

7. In response to this notice, the CLC received a letter in opposition to the transfer from the Holy Cross Armenian Catholic Parish Church ("Holy Cross") located at 100 Mt. Auburn Street, Cambridge, Massachusetts. The CLC rejected this notice of opposition as not properly indicating due authorization from the Church's Governing Body.

8. In a letter dated May 25, 1977, Holy Cross again advised the CLC that it objected to the transfer of the liquor license to Grendel's. See Exhibit A.

9. On May 31, 1977, the CLC, acting pursuant to M.G.L. c. 138, §16C denied the application for the transfer of Scorpio's license to Grendel's. See Exhibit B.

10. On July 1, 1977, Grendel's and Scorpio's Inc. appealed the CLC's decision to the Commission. See Exhibit C.

11. On September 8, 1977, the Commission convened on the plaintiff's appeal, see Exhibit D and on that same day rendered a decision sustaining the action of the CLC. See Exhibit E.

Agreed to this day April 14, 1980.

David Rosenberg Attorney for the Plaintiff Langdell Hall Cambridge, MA 02138	Gerald J. Caruso Attorney for the Commission Assistant Attorney General Government Bureau One Ashburton Place Boston, MA 02108 (617) 727-1022
Laurence H. Tribe Griswold Hall Cambridge, MA	Michael Costello Attorney for the CLC City Hall Cambridge, MA 02139

EXHIBIT A

[letterhead omitted]

May 25, 1977

City of Cambridge
License Commission
City Council Chamber
City Hall
Cambridge, Mass.

Gentlemen:

We are in receipt of the second petition from Grendel's Den, Inc. requesting an All Alcoholic Restaurant License, hearing to be held on May 31, 1977.

The Council of the Holy Cross Church and the parishioners unanimously rejected in the past and again in the present, the idea of having so many liquor licenses so near to our Church.

We already have plenty of noise, dirt, and abuse from Grendel's Den, Inc.

We are kindly asking the Commission to reject the above License. Holy Cross Church Council and myself - Pastor of Holy Cross Church personally - object to the transfer of any liquor license to Grendel's Den, Inc.

Sincerely,

Pastor

EXHIBIT B

[letterhead omitted]

June 1, 1977

John J. Campbell, Esq.
1 Center Plaza
Boston, Massachusetts

Re: Grendel's Den, Inc. - All Alcoholic Restaurant License

Dear Mr. Campbell:

The Board of License Commissioners has voted to deny the application of Scorpio's, Inc. for permission to transfer its license to sell all alcoholic beverages as a restaurant at 1080 Massachusetts Avenue to Grendel's Den, Inc., Frank St. Peter, Manager at 89 Winthrop Street.

As was stated at the hearing held on May 31, 1977, the Board received a letter of objection from the Pastor of Holy Cross Armenian Church (Father Luke Arakelain) which is within 10 feet of the proposed location.

If you have any further questions, please call the License Commission office.

Yours very truly,

Phyllis A. McLaughlin
Secretary

PAM;pm
cc: Grendel's Den, Inc.
Alcoholic Beverages Control Commission

encl. (2)

EXHIBIT C

[letterhead omitted]

July 1, 1977

Alcoholic Beverage Control Commission
100 Cambridge Street
Boston, Massachusetts

RE: Transfer of all alcoholic restaurant license - Scorpio, Inc. to 89 Winthrop Street and then transfer to Grendel's Den, Inc.

Gentlemen:

On behalf of above named Scorpio's Inc. and Grendel's Den, Inc., I appeal decision of the Cambridge License Commission of June 28, 1977 in denying an application of Scorpio's Inc., to transfer all alcoholic restaurant license to 89 Winthrop Street, and then transfer same to Grendel's Den, Inc.

Yours truly,

JOHN J. CAMPBELL

JJC:mjr
cc: Cambridge License Commission

EXHIBIT D

HEARING BEFORE THE COMMONWEALTH OF MASSACHUSETTS, THE Alcoholic Beverages Control Commission on the matter of an appeal of Scorpio's Inc. from the action of the Cambridge Licensing Board in denying the application of the above to transfer its all alcoholic Restaurant license from 1080 Massachusetts Avenue to Grendel's Den, Inc. at 89 Winthrop Street in said Cambridge.

SITTING:	Herbert N. Goodwin, Chairman - Presiding Fletcher H. Wiley, Commissioner
APPEARANCES FOR THE LICENSEE	John J. Campbell, Atty. 1 Center Plaza Boston, MA
	Michael Gardner, Atty. 1 Center Plaza Boston, MA
APPEARANCE FOR THE CITY	No on [sic] Appearead [sic]
DATE OF HEARING:	September 8, 1977

GOODWIN: This is the 3:45 P.M. hearing out of Cambridge involving Scorpio's Inc., located at 1080 Massachusetts Avenue appealing a decision of the Cambridge Licensing Board in denying their application to transfer its all alcoholic Restaurant license to Grendel's Den, Inc. 89 Winthrop Street is the licensee represented?

CAMPBELL: Yes it is, John J. Campbell, One Center Plaza in Boston, MA

GOODWIN: I see, and is the City of Cambridge represented?

GARDNER: My name is Michael Gardner and I am from the law firm of Mintz, Levin, Cohen, Glasky and Popec at One Center Plaza and I am also here on behalf of the lciensee.

GOODWIN: I see. Is the City of Cambridge here, represented?

CAMPBELL: No they are not represented.

GOODWIN: Nor [sic] represented. Well, before proceeding were you furnished with a Statement of Reasons as to why they denied?

CAMPBELL: Well, Mr. Chairman, I have a letter dated June 1, 1977 and I'll present this to the Board, or do you wish me to read this into the record?

GOODWIN: It makes no difference to us.

CAMPBELL: Well, I'll read it, "Sir. The Board of License Commissioners has voted to deny the application of Scorpio's Inc. for permission to transfer its license to sell all alcoholic beverages as a Restaurant at 1080 Massachusetts Avenue to Grendel's Inc., Frank St. Peter, Manager at 89 Winthrop Street in Cambridge, MA. As was stated at the hearing held on May 31, 1977, the Board received a letter of Objection from Pastor of the Holy Cross Armenian Church, Father Luke Arkalian, which is within 10 feet of the proposed location. If you have any further questions, please call the Licensing Board office. Yours Very Truly, Phyllis A. McLaughlin, Secretary."

GOODWIN: I see, and is it your understanding that the license was denied because they felt it was mandatory under Section 16(C)?

CAMPBELL: Yes Sir:

GOODWIN: Were you at the hearing, was that fairly clear?

CAMPBELL: Yes Sir, it is quite clear.

GOODWIN: Because, sometimes people can object and they, just because you are a Church you have a standing to object anyway.

CAMPBELL: Well, the Church filed the appropriate form of written objection to the transfer of the license which was presented at the hearing on the 31st of May.

GOODWIN: This is a transfer, you were more than 10 feet away prior?

CAMPBELL: The proposed premises were within ten feet of the Church. And, the previous premises were a longer distance from the Church.

GOODWIN: And no grandfather clause or anything like it?

CAMPBELL: No grandfather clause.

GOODWIN: No prior license, and I suppose, basically you're here, you understand the law mandates their refusal, and I assume we are in the same position because we are not going to declare a statute unconstitutional, at this level, and I don't know is there anything else you want to . . .

CAMPBELL: Well, [illegible] would like to add . . .

GOODWIN: You can put anything you want on the record for whatever purposes you might like to make.

CAMPBELL: Mr. Kuelzer has done a detailed study of the other licenses that have been permitted in Harvard Square since this law has been effective, and since Father Luke has been in the square, and he comes up with fourteen licenses within 500 feet of the Church, and Mr. Kuelzer would like to take the witness stand, here and explain what he has done.

GOODWIN: Surely, I wasn't aware there were going to be witnesses, why don't I just swear them in. Are there going to be any additional witnesses? (Witnesses sworn).

KUELZER: I made a list of all the licenses that came in since

1960, or so, and I got these dates from Mrs. McGlaughlin of the Cambridge Licensing Commission; and, there were fourteen that were within the violation, and some of them were . . .

GOODWIN: Within 500 feet?

KUELZER: Within 500 feet, and some of the licenses were opposed . . . .

GOODWIN: How do you know?

KUELZER: How do I know they are within 500 feet, so I drew a circle on the map . . .'

CAMPBELL: The map is before you Mr. Chairman.

KUELZER: And, all of these seem to be within the 500 feet radius. So, I just wanted to make sure that these cases of licenses that the Father did not oppose, and he opposes mine, now. And, I though [sic] that maybe I was wrong with the premises that Father Luke, would, perhaps, explain now this comes about. I talked to him . . .

GOODWIN: Well, maybe 10 feet is a little too close for comfort, I don't know . . .

KUELZER: He has opposed some of them that were farther away then [sic] others that he had granted. He opposed Swiss Alps and he didn't oppose, at least not for a while Casa Mexico. They got a license, and later on he opposed Swiss Alps, which is further away, and even closer if the licenses of the Garage are included. I don't know, I was thought, hoping that perhaps you could explain it to us. That's all, but I guess he has the right just to deny it, I guess.

GOODWIN: Under the statute which presently exists, was it a governing body of the Church?

KUELZER: Yes, the governing body of the Church can deny it, so it really doesn't make any difference what the circumstances are, it always applies when he opposes it.

GOODWIN: That is the present statute, as I understand the law.

WILEY: That is my understanding too.

KUELZER: Okay, then I will be satisfied with that explanation. Thank you.

GOODWIN: Is there anything else you want to include for any purposes?

CAMPBELL: No, sir, that concludes the testimony.

GOODWIN: Okay, we can write some sort of opinion and get it out to you, you will be advised.

END OF HEARING

EXHIBIT E

[letterhead omitted]

September 8, 1977

IN RE: Scorpio's Inc.
1080 Mass. Ave.
Cambridge

DECISION

This matter came on for hearing before the Commission on September 8, 1977 on the appeal of Scorpio's Inc. the holder of an all alcoholic Restaurant license for premises located at 1080 Massachusetts Avenue in Cambridge, from the action of the Cambridge Licensing Board in denying the application to transfer said license to Grendel's Den, Inc. at 89 Winthrop Street in said Cambridge.

On the basis of this hearing, the Commission upholds the actionof [sic] the local board on the grounds that the governing body of the church objected to the license ofthe [sic] premises under the provisions of Chapter 138, Seciton [sic] 16C and this represents an absolute veto. We find that the church's objection under Section 16C was the only basis on which the transfer was denied.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Herbert N. Goodwin, Chairman

Fletcher H. Wiley, Commissioner

HNG/dem/cc:
Licensing Board
John J. Cambell, Atty.
file

EXHIBIT F

[letterhead omitted]

September 12, 1979

David Rosenberg, Esquire
Harvard Law School
264 Langdell Hall
Cambridge, Massachusetts 02138

RE: Grendell's Den, Inc. v. Herbert N. Goodwin, et al
(U. S. District Court No. 77-3418-T)

Dear Mr. Rosenberg:

Enclosed please find a list of alcoholic beverages licensees within 500 feet of the Holy Cross Armenian Church located at 100 Mt. Auburn Street in Cambridge. Unless you notify me to the contrary I shall assume that my having supplied you with this list will obviate the need for the state defendants to answer interrogatories 1-10. This list seems to answer interrogatories 2(a) and 2(b) in full, and the answer to interrogatory 2(c) is obviously no or these licenses would not be in existence. The answers to all of the other interrogatories would seem to be derivative of the answers to interrogatory two.

If you have any questions regarding this matter please do [sic] hesitate to telephone me at 727-1034.

Thank you for your consideration in this matter.

Very truly yours,

Thomas Miller
Assistant Attorney General

TM/lm

cc: Michael C. Costello, Esquire

[letterhead omitted]

MEMORANDUM

TO:	Assistant Attorney General Tom Miller
FROM:	Ted Finnegan, Alcoholic Beverages Control Commission
DATE:	September 10, 1979
IN RE:	Licensed Premises Within 500 Feet of Holy Cross Armenian Church, Cambridge

1. Please refer to our conversation of Friday, September 7, 1979 concerning the subject listed above.

2. Investigators John Lownie and Robert Wall have compiled the following list of licensed premises within the 500 feet radius:

Licensed premises within radius of
500 ft. of the Holy Cross Armenian
Church, 100 Mt. Auburn Street,
Cambridge

Type of License	Address	Licensees	Approved
A.B. Rest.	4-12 Boylston St.	Wursthaus Inc.	1962

Type of License	Address	Licensees	Approved
A.B. Rest.	22 "	Library Rest, Inc.	1966
A.B. Rest.	30 Boylston St.	Kings Tavern	1969
Commercial Club	30B "	Essex Lunch	1973
W & M Package	34 "	Cave Atlantique	1974
W & M Rest.	36 "	The Continental Shelf, Inc.	1971
A.B. Rest.	37 "	Whitneys Cafe, Inc.	1971
A.B. Rest.	56 "	Innhoff, Inc. transferred from 124 Mt. Auburn St.	2-10-76
W & M Rest.	56R "	Iruna Rest. transferred from 28 Putnam Ave.	1970
A.B. Comm. Club	33 Dunster St.	33 Dunster St. Inc. transferred from 540 Memorial Dr.	10-29-71

Type of License	Address	Licensees	Approved
A.B. Rest.	10 Eliot St.	Charlie's Rest. Inc. transferred from Boylston St.	9-10-63
W & M Rest.	14a Eliot St.	Marol Enterprises, Inc. transferred from Prospect St.	11-27-74
W & M Pkg.	14b "	Eliot St. Winery Inc. transferred from 480 Mass. Ave.	12-11-75
W & M Rest.	18 "	Ital. Food Crop. Original	2-8-79
A.B. Rest.	9-11 Brattle St.	The Atrium	1967
W & M Rest.	39 "	Cardelli, Inc.	1973
A.B. Package	1388-90 Mass. Ave.	Varsity Liquor Store	1962

Type of License	Address	Licensees	Approved
A.B. Rest.	44 Church St.	Chez Dreyfus	1955
W & M Pkg.	45 "	Edwin R. Sage, Inc.	1952
A.B. Pkg.	94 Mt. Auburn St.	Harvard Provision Co., Inc.	1963
A.B. Rest.	114-18-20 Mt. Auburn St.	Swiss Alps	1960
A.B. Rest.	119-21 "	Ferdinands	1965
A.B. Rest.	123-3a123b "	The Blue Parrot, Inc. W&M approved W&M to A.B. transferred	4-4-68 11-17-77
A.B. Inn	124-28 "	Inhoff Rest.	2-10-76
A.B. Rest.	75 Winthrop St.	Casa Mexico	4-24-73
A.B. Rest.	96 "	State St. Rest. Corp.	8-4-76

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal R. Civ. P. 56(b), the state defendants, the members of the Alcoholic Beverages Control Commission, move this court to enter partial summary judgment in the above-entitled case on the basis that:

1. The plaintiff is precluded from recovery because of the doctrine of Parker v. Brown, 317 U.S. 341 (1943);

2. M.G.L. c. 138, §16C does not violate the Establishment Clause of the First Amendment to the United States Constitution;

3. M.G.L. c. 138, §16C does not violate the Due Process Clause of the Fourteenth Amendment of the United States' Constitution;

4. M.G.L. c. 138, §16C does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

As grounds for their motion the defendants state that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.

By their attorneys

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

____
Gerald J. Caruso
Assistant Attorney General
Government Bureau Rm. 2019
One Ashburton Place
Boston, Massachusetts 02108

Date: April 11, 1980

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

CAMBRIDGE LICENSING COMMISSION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal R. Civ. P. 56(b), the members of the Cambridge Licensing Commission, move this court to enter partial summary judgment in the above-entitled case on the basis that:

1. The plaintiff is precluded from recovery because of the doctrine of Parker v. Brown, 317 U.S. 341 (1943);

2. M.G.L. c. 138, §16C does not violate the Establishment Clause of the First Amendment to the United States Constitution;

3. M.G.L. c. 138, §16C does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

4. M.G.L. c. 138, §16C does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

As grounds for their motion the defendants state that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.

By their attorney,

Michael Costello
Attorney for CLC
City of Cambridge
City Hall
Cambridge, MA 02139

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff

v.

HERBERT N. GOODWIN, ET AL., Defendants

CIVIL ACTION
NO. 77-3418-T

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal R. Civ. P. 56(a) plaintiff, Grendel's Den, Inc., moves this court to enter partial summary judgment in the above-entitled case on the basis that:

1. the plaintiff is not precluded from recovery because of the doctrine of Parker v. Brown, 317 U.S. 341 (1943);

2. M.G.L. c. 138, §16C violates the Establishment Clause of the First Amendment to the United States Constitution;

3. M.G.L. c. 138, §16C violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

4. M.G.L. c. 138, §16C violates the Equal Protection Clause of the the Fourteenth Amendment to the United States Constitution.

As to these issues the plaintiff states that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

By its attorneys,

David Rosenberg
Langdell Hall
Cambridge, MA 02138

Of Counsel:
Ira Karasick

Laurence H. Tribe
Griswold Hall
Cambridge, MA 02038

DATE: April 14, 1980

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

JUDGMENT

Upon the opinion and order issued and entered on August 14, 1980 granting plaintiffs' motion for partial summary judgment on the Due Process and Establishment Clause claims and denying defendants' motion to dismiss the antritrust claims under the state exemption doctrine of Parker v. Brown, 317 U.S. 341 (1942), the Court:

1. Determines that there is no reason for delay and directs entry of final judgment for plaintiffs on their claims that Mass. Gen. Laws ch. 138, §16C violates the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment to the Constitution, and it is

ORDERED AND ADJUDGED that Mass. Gen. Laws ch. 138, §16C and its enforcement by defendants are hereby declared void and in violation of the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment to the Constitution.

2. It is further ORDERED pursuant to 28 U.S.C. §1292(b) that the Court's order entered on August 14, 1980 is amended to include the following:

(i) that defendants' motion to dismiss the antitrust claims under the state action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1942) is denied, and

(ii) that in the Court's opinion such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

United States District
Judge

Dated: 9/5/80

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

GRENDEL'S DEN, INC., Plaintiff v. HERBERT N. GOODWIN, ET AL., Defendants	CIVIL ACTION NO. 77-3418-T

NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3(a), notice is given that the state defendants, Herbert N. Goodwin, Fletcher Wiley, and John Larkin, appeal to the First Circuit Court of Appeals the Judgment of this Court entered on September 5, 1980.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Gerald J. Caruso
Assistant Attorney General
Government Bureau, Rm. 2019
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1022

DATE: September 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1653

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,
v.
HERBERT N. GOODWIN, ET AL.,
Defendants, Appellees.

No. 80-1654

GRENDEL'S DEN, INC.,
Plaintiff, Appellee,
v.
HERBERT N. GOODWIN, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: April 7, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with the opinion filed this day.

By the Court

Clerk.

[cc: Messrs. Caruso, Albright, and Tribe.]

Motion to Dismiss or Affirm

Office - Supreme Court,
FILED
DEC 14 1981
ALEXANDER STEVA
CLERK

No. 81-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN P. LARKIN, ET AL.,
Appellants,
v.
GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION TO AFFIRM

LAURENCE H. TRIBE
1525 Massachusetts Avenue,
Cambridge, Massachusetts 02138
(617) 495-4621
Counsel for Appellee

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

May a state delegate to each "church or synagogue . . . dedicated to divine worship" an absolute power to outlaw the sale of liquor within 500 feet by anyone against whom the religious body chooses, for whatever reason, to direct a "written objection"?

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Table of Authorities Cited.

CASES.

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New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 5n, 9, 10n

New York State Liquor Authority v. Bellanca, 101 S.Ct. 2599 (1981) 8, 9

Pacific Union Conference v. Marshall, 434 U.S. 1305 (1977) 2n

Parker v. Brown, 317 U.S. 341 (1943) 4n

Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (1981) 8

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 7n

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) 10n

Walz v. Tax Commission, 397 U.S. 664 (1970) 5n, 7n

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 10n

Widmar v. Vincent, No. 80-689 (U.S. Sup.Ct., Dec. 8, 1981) 7n

Wiles v. Michigan Liquor Control Commission, 229 N.W.2d 434 (Mich. App. 1975) 8n

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United States Constitution
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c. 138, § 16C passim

RULES.

United States Supreme Court Rule 16 1

MISCELLANEOUS.

Argument of Louis D. Brandeis, Esq., on Behalf of the Massachusetts Protective Liquor Dealers' Association Before the Joint Committee on Liquor Law of the Massachusetts Legislature (Feb. 27, 1891), reprinted in 1 Hearings on the Nomination of Louis D. Brandeis Before a Subcommittee of the Senate Judiciary Committee, 64th Cong., 1st Sess. 1065 (1916) 4n

No. 81-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN P. LARKIN, ET AL., *Appellants,*

v.

GRENDEL'S DEN, INC., *Appellee.*

ON APPEAL FROM AN EN BANC JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee Grendel's Den, Inc., moves that the *en banc* judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that the judgment is plainly correct and the challenge to it so insubstantial as to warrant no further argument.

Statement of the Case.

Massachusetts General Laws c. 138, § 16C, App. 4A-5A, delegates to each "church or synagogue . . . dedicated to divine worship" an absolute power to ban the sale of liquor within 500 feet by anyone against whom the religious body chooses, for whatever reason, to file a "written objection."[1] The district court ruled this delegation of veto power facially violative of the Due Process Clause, App. 111A, and of the Establishment Clause. App. 123A. After initially reversing this ruling, App. 31A, the First Circuit granted rehearing *en banc*, App. 149A, and then affirmed the district court's judgment. App. 1A. The circuit court's *en banc* decision did "not reach the due process claim[ ]" (App. 9A) against what the court called "this standardless grant of authority," App. 13A n.5, but held that Section 16C's "non-generalized grant to churches of . . . absolute discretion to confer or withhold an important commercial privilege in a teeming business and entertainment area . . . distributes benefits on an *explicitly religious basis*," App. 14A-15A, in violation of the Establishment Clause.[2]

---

[1] It is undisputed that the filing of a written objection under Section 16C by a church located within 500 feet of appellee was the only basis on which appellee's license application was denied by appellant Cambridge License Commission, and was the only basis on which that denial was in turn upheld by appellant Massachusetts Alcoholic Beverage Control Commission, which described the filing of a church objection under Section 16C as constituting an "absolute veto." App. 3A-4A.

[2] Appellee, plaintiff in the district court, had also alleged that Section 16C is facially violative of the Equal Protection Clause. The district court's denial of appellee's motion for summary judgment on that issue, App. 134A, was, of course, not appealable at this interlocutory stage. *See Pacific Union Conference* v. *Marshall*, 434 U.S. 1305 (1977) (Rehnquist, J., in chambers); *cf. Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976). *See* J.S. 13 n.7.

Argument.

I. THE ESTABLISHMENT CLAUSE HOLDING OF THE COURT OF APPEALS WAS PLAINLY CORRECT.

Contrary to appellants' assertion, Section 16C does *not* simply "bestow on churches and schools the benefit of a liquor-free zone." J.S. 46.[3] By its terms, and as authoritatively construed by the state's highest court,[4] Section 16C instead bestows the far less benign benefit of "a *veto power* over liquor sales" — a power which extends, one-by-one, to each restaurant and bar located in a zone covering "roughly one million square feet . . . of what may be a city's most commercially valuable sites." App. 13A (emphasis added).[5]

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[3] The district court suggested that such a zone, surrounding churches and schools but not other analagous places, would be deemed permissible. App. 114A. The *en banc* Court of Appeals panel may have thought otherwise. *See* App. 14A. That question certainly need not be addressed in this case.

[4] *See Arno* v. *Alcoholic Beverages Control Commission*, 377 Mass. 83, 384 N.E.2d 1223, 1228 (1979) (analyzed by the district court at App. 112A-120A n.8).

[5] The 500-foot circle that centers upon the objecting church in this case encompasses not only appellee's restaurant but virtually the entire area known as Harvard Square, the celebrated business and entertainment center of Cambridge. Within the area thus controlled by the church, "there are at least 26 premises licensed to sell liquor," App. 3A; the church permitted more than half of these premises to establish their liquor licenses during the decade (1971-1981) in which it continuously opposed such a license for appellee Grendel's Den. *See* Appendix to Appellants' Brief in Court of Appeals at 40-42. Curiously, even the initial First Circuit decision reversing the district court's judgment, *see* App. 31A, seems to have acknowledged that the Constitution would bar giving churches "power to 'veto' licensing within an excessively broad radius such as five miles." App. 79A n.9. But if five miles is "excessively broad," it is a mystery why a radius sufficient to engulf all of Harvard Square is not. At all events, the gist of the challenge to Section 16C is that it entrusts governmental power to churches; the particular *radius* of the sphere of influence thereby ceded to religious bodies — whether ten feet or ten miles — is constitutionally immaterial.

Appearing before the Massachusetts Legislature a quarter of a century before his appointment to this Court, Justice Brandeis testified against conferring such case-by-case veto power. Granting such a veto, he observed, would give anyone entrusted with it

> the whip hand over the applicant for a license; and it will depend entirely upon the character of him who holds that whip, whether this instrument of castigation be used for the owner's protection or be applied in securing unjust booty. . . . [W]hen you give the absolute right to object, you have put into the hands of men an irresistible weapon.[6]

The Court of Appeals likewise recognized that Section 16C creates a legally sanctioned privilege for each "church or synagogue . . . dedicated to divine worship" to "bargain over the sale of . . . an indulgence" to any or all of its neighbors if it chooses to do so. App. 12A. Whatever the economic value of the bargaining power thus conferred,[7] the very existence of discretion to exercise such a veto (or to decline to do so once one's terms have been met) indisputably constitutes a "specialized political power," *id.*, that the Massachusetts Legislature chose to confer "on an *explicitly religious basis*." App. 15A.

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[6] *Argument of Louis D. Brandeis, Esq., on Behalf of the Massachusetts Protective Liquor Dealers' Association Before the Joint Committee on Liquor Law of the Massachusetts Legislature* (Feb. 27, 1891), *reprinted in* 1 *Hearings on the Nomination of Louis D. Brandeis Before a Subcommittee of the Senate Judiciary Committee*, 64th Cong., 1st Sess. 1065 (1916).

[7] Inasmuch as the state-action antitrust exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943), is inapplicable, *see* App. 138A; J.S. 11 n.6, 15 n.9, appellee would be free to offer proof at trial, should its facial challenges to Section 16C be rejected here, that the church in question was in fact improperly induced to veto appellee's license by congregation members and church contributors who were in competition with appellee, *see* Complaint ¶12, and that appellants should therefore be enjoined from giving effect, by denying appellee's license, to the veto resulting from such a violation of the Sherman Act, 15 U.S.C. §§ 1-2.

The Court of Appeals was plainly correct in concluding that "no reasonable reading . . . can transform Section 16C into a religiously neutral law." App. 15A-16A.[8] Because the law quite literally "establishes" certain religious bodies, defined and singled out as such, as the repositories of quintessentially governmental power — power to control the everyday conduct of, and to distribute commercial opportunities among, members of the general public throughout a significant geographical area — Section 16C presents the purest imaginable example of a direct state establishment of religion.[9]

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[8] The inclusion of schools in the class benefited by Section 16C, as the Court of Appeals recognized, certainly does not cure the law's failure to encompass others "who are similarly situated to churches in all respects *except* dedication to 'divine worship.'" App. 23A (emphasis added).

[9] Any legitimate secular goal to be served by preserving tranquility around churches and other institutions in need of such protection, *see* App. 26A-30A (Campbell, J., dissenting), could, of course, be advanced in the usual way — *viz.*, by directing the responsible public authorities to consider the interests of such institutions, either *sua sponte* or at the suggestion of affected individuals or businesses, in appropriate proceedings. *Cf. New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *id.* at 114 (Blackmun, J., joined by Powell, J., concurring in result). Instead, Section 16C gives churches and synagogues the inherently governmental role of vetoing proposed land uses, *cf. Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (taking private property is a function "traditionally associated with sovereignty"), thereby entrusting "'to religious societies as such a legal agency in carrying into effect a public and civil duty.'" *Walz* v. *Tax Commission*, 397 U.S. 664, 712 (1970) (Douglas, J., dissenting) (quoting James Madison). That the decision of the religious body is conclusive under Section 16C only when it *exercises* its veto, *see* App. 121A-122A (absence of church veto does not guarantee issuance of license), shows only that Section 16C stacks the deck — not that the power delegated is any the less governmental. After all, the veto power of the President under Article I, Section 7, Clause 2, is hardly rendered "non-governmental" in character by the fact that the provision

It makes no difference that Section 16C establishes such religious power with respect to the sale and consumption of liquor rather than some other commodity. *See* App. 15A, 24A n.11. For the Twenty-First Amendment gives the *states*, not *churches*, broad power in this sphere. Surely a state could not, despite the Twenty-First Amendment, delegate unbridled control over liquor consumption, say, to male family heads.[10] It is even clearer that a state may not, despite that amendment, establish churches as liquor-control agencies. Would the Twenty-First Amendment permit Massachusetts to dedicate a fixed percentage of the proceeds from the sale of liquor licenses to those churches (or even to those churches and schools) that are located within 500 feet of the licensed premise? Any such scheme would plainly violate the Establishment Clause. Appellants would distinguish Section 16C because it "does not provide monetary aid to religious institutions." J.S. 35. That is a distinction without a difference: money counts only because of the power it permits its possessor to wield; when power is conferred directly, the fact that no cash changes hands could not matter less.

That a state may not give local churches and schools one seat apiece on a local zoning board — or, despite the Twenty-First Amendment, on a liquor control board — seems indisputable. The same principle condemns Section 16C. Religious bodies and their members may invoke the shields of free speech, free-

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allows the President unilaterally to *doom* legislation that cannot command two-thirds support in the House and Senate, but creates no analagous presidential power to *enact* legislation.

[10] That the Equal Protection Clause prevents states from delegating to husbands control over all jointly held property was settled by *Kirchberg* v. *Feenstra*, 101 S.Ct. 1195 (1981). And that such Fourteenth Amendment norms do not cease to be applicable simply because state control over the sale and consumption of liquor is at issue was settled by *Craig* v. *Boren*, 429 U.S. 190 (1976) (state cannot set higher drinking age for males than for females).

dom of association, and free exercise of religion when they enter into open public debate,[11] but they may not be handed the sword of official public power — power to make binding decisions about the activities in which non-members may lawfully engage.[12]

To be sure, the Massachusetts Supreme Judicial Court recently sustained Section 16C over a similar attack.[13] But appellants' uncertainty over "which decision, state or federal, is the controlling precedent in Massachusetts," J.S. 18, would obviously be resolved with minimum delay and waste by summary affirmance of the decision below. Appellants assert that several other courts have likewise upheld provisions similar to Section 16C. *See* J.S. 20-21. But the only decision that appears to have sustained a *delegation* to churches of the power to *veto* nearby liquor licenses was one rendered six years ago by an intermediate appellate state court whose opinion disposed of the entire Establishment Clause claim in one perfunctory paragraph 20 words in length.[14] More than this, surely, is required to establish a genuine need for "the plenary consideration of this Court." J.S. 19.

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[11] *See Widmar* v. *Vincent*, No. 80-689 (U.S.Sup.Ct., Dec. 8, 1981) (freedoms of speech and association entitle student groups to hold prayer meetings and religious discussions on state university campus if student meetings on other subjects are allowed); *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (ministers cannot be excluded by law from state legislative office); *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970) (religious bodies have same right as secular bodies to "take strong positions on public issues") (dictum).

[12] Although religious bodies have the right, under this Court's decisions protecting church autonomy, *see Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), to make binding decisions as to *their own members and officials*, some Justices have perceived even in that context a danger that blind enforcement of church decisions by government "can easily [make enforcing civil authorities] into handmaidens of arbitrary lawlessness." *Id.* at 727 (Rehnquist, J., joined by Stevens, J., dissenting). *A fortiori*, when church decisions reach out to the broader public and dispose of the personal or pecuniary interests of non-members, *see* note 9 *supra*, it seems an understatement that making "available the coercive powers of civil [bodies] to rubber-stamp ecclesiastical decisions of . . . religious associations, when such deference is not accorded similar acts of secular voluntary associations, would . . . create . . . serious problems under the Establishment Clause." *Id.* at 734.

[13] *See* note 4 *supra*.

Nor, finally, does the holding below conflict with this Court's decisions sustaining "the power of a State to prohibit topless dancing in an establishment licensed by the State to serve liquor." *New York State Liquor Authority* v. *Bellanca*, 101 S.Ct. 2599, 2600 (1981) (*per curiam*); *California* v. *LaRue*, 409 U.S. 109 (1972). Even assuming that the state's "power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," *Bellanca*, 101 S.Ct. at 2601,[15] that proposition reflects two special considerations, both absent here: first, that unique problems are "associated with mixing alcohol and nude dancing," *id.*; and, second, that zoning erotic activities away from places where alcohol is consumed may indeed be a "lesser" exercise of governmental power than banning either component of the mix — suggestive nudity *or* liquor — altogether. *Cf. Schad* v. *Borough of Mount Ephraim*, 101 S.Ct. 2176 (1981) (striking down community-wide ban on live entertainment); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding municipal ordinance requiring at least 1,000 feet between adult book stores, adult movie theaters, liquor stores, pool halls, and the like). Delegating to churches the power to zone the sale of liquor out of the business district such churches occupy — and especially the power to do so selectively, permitting whichever nearby liquor establishments the churches in question decide to favor — differs in both these crucial dimensions from the legislative actions upheld in *Bellanca* and *LaRue*. As this Court recognized nearly a century ago,

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[14] *Wiles* v. *Michigan Liquor Control Commission*, 229 N.W.2d 434, 437 (Mich. App. 1975), discussed by the district court at App. 133A n.12.

[15] *But see id.* at 2602 & n.3 (Stevens, J., dissenting).

> the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another [is] intolerable in any country where freedom prevails.

Yick Wo v. *Hopkins*, 118 U.S. 356, 370 (1886). And the very idea that one's occupational liberty may be submitted to the absolute veto of a *religious body* is even more plainly intolerable in any nation whose founders sought "to escape the bondage of laws which compelled them to support and attend government-favored churches." *Everson* v. *Board of Education*, 330 U.S. 1, 8 (1947). Neither *Bellanca* nor *LaRue* remotely sustains appellants' proposed retreat from these bedrock principles.

II. THE JUDGMENT BELOW IS INDEPENDENTLY SUPPORTED BY SETTLED DUE PROCESS DOCTRINES.

Even if this Court were to accept appellants' reading of the Establishment Clause, it would be clear that the Due Process Clause itself forbids delegating absolute veto power, standardless and unreviewable, over an otherwise lawful land use to *any* private body, religious *or* secular, that is neither politically nor legally accountable to those it regulates or to the public for the criteria that guide its choices. *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912); *see also New Motor Vehicle Board*, *supra* note 9, 439 U.S. at 125-27 (Stevens, J., dissenting). The district court in this case correctly held that Section 16C does just that. App. 111A-122A. Although the Court of Appeals did not reach the due process issue in its *en banc* opinion, App. 9A,[16] it is difficult to imagine a stronger case for application of the *Eubank* doctrine — a doctrine most recently recalled with approval by this Court in *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 & n.12 (1976) (distinguishing *Eubank* from a delegation to the entire local electorate).[17]

Because Section 16C plainly abridges Fourteenth Amendment due process limits upon the unbridled delegation of power to private groups, and because the Twenty-First Amendment confers no license on states to violate the Fourteenth, *see Craig* v. *Boren*, *supra* note 10, 429 U.S. at 205-09, the *en banc* judgment below should be affirmed, whatever the disposition of the Establishment Clause claim.

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[16] Had it done so, its characterization of that issue strongly suggests that it would have found *Eubank* controlling. *See* App. 13A-13B & n.5.

[17] Section 16C's 1954 predecessor flatly banned all liquor sales within 500 feet of any church or school; in 1968, the ban was amended to permit *waiver* by the church or school; in 1970, the law was given its present form, under which liquor sales within the 500-foot zone are permitted unless a *veto* is registered by the church or school. *See* App. 114A-115A. For Establishment Clause purposes, the 1968-1970 "waiver" version of the law and the "veto" version (applicable from 1970 to the present) obviously do not differ; whether the 1954-1968 "flat-ban" version should be differently assessed under the Establishment Clause is unclear, but need not be decided in this case. *See* note 3 *supra*.

For purposes of the Due Process Clause, however, it is only the veto form that is indisputably void under *Eubank*. For, in *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (1917), the Court suggested that a land-use ban subject to waiver or consent by a specified number of affected private parties would be acceptable as a due process matter even though, given *Eubank*, a permissive land-use provision assigning to certain affected private parties a power of *veto* would be forbidden. But *Cusack* may have rested on the long-dead "right-privilege" distinction. *See id.* at 530. And in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), the Court observed that a "grant of permission for [a] use, although [literally framed as a prohibition] . . . subject to . . . consents, shows that the legislative body found [such use to be] in harmony with the public interest." *Id.* at 121. Moreover, in *City of Eastlake*, *supra*, 426 U.S. at 677-78 & n.12, this Court described the *Eubank-Roberge* line of decisions approvingly while adverting to the *Cusack* precedent in what appear to be more guarded terms. But even if *Cusack* should be regarded as limiting *Eubank*, *see New Motor Vehicle Board*, *supra* note 9, at 109, there can be no question that *this* statute falls squarely on the *Eubank* side of the resulting line: Section 16C is without doubt a veto provision — one in which the disputed use is allowed unless certain individuals object.

Conclusion.

For these reasons, the judgment of the Court of Appeals should be affirmed.

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Appellant's
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No. 81-878

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, ET AL.,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Pursuant to Rule 16.5 of the rules of this Court, the appellants, the members of the Massachusetts Alcoholic Beverages Control Commission (the Commission) and the City of Cambridge License Commission, file this opposition to the appellee's (Grendel's) Motion to Affirm (M.T.A.).

I. BY ITS RELIANCE UPON DUE PROCESS ANALYSIS TO BUTTRESS THE FIRST CIRCUIT'S RATIONALE FOR INVALIDATING §16C, GRENDEL'S ACKNOWLEDGES THE WEAKNESS OF THAT RATIONALE AND INVITES PLENARY CONSIDERATION.

The "gist of [Grendel's] challenge to section 16C is that it entrusts governmental power to churches." M.T.A. p. 3, n. 5. Grendel's Establishment Clause claim remains, in the words of the District Court, a mere "spinoff" of its Due Process theory. Grendel's Den Inc. v. Goodwin, 495 F. Supp. 761, 768 (D. Mass. 1980), App. 103A. As a result, Grendel's avoids any discussion in its motion to affirm of the traditional Establishment Clause principles of Lemon v. Kurtzman, 403 U.S. 602 (1971). Instead, it presents its Establishment

Clause argument in terms of Due Process and delegation.[1] In this regard, Grendel's obscures the First Circuit's true holding by suggesting that the Court based its decision on the delegation claims raised by Grendel's. The First Circuit did not rely on such claims. The Court's opinion rests squarely on Establishment Clause principles, App. 17A-23A,[2] and it specifically declined to address Grendel's due process assertions. See Grendel's II, 662 F. 2d at 107 n. 11, App. 24A, n. 11. Grendel's attempt to strengthen the First Circuit's decision through an infusion of due process principles serves only to highlight the weakness of the en banc opinion.[3/]

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[1] *E.g.*, M.T.A. p. 3 (statute bestows a veto power); p. 5 (law establishes churches as "repositories of quintessentially governmental power"); p. 7 (the law hands churches "the sword of official public power").

[2] The two opinions issued by the First Circuit are now reported. The original panel's decision (*Grendel's I*) is reported at 662 F. 2d 88. The *en banc* opinion (*Grendel's II*) immediately follows the first at 662 F. 2d 102.

As explained in the Commission's Jurisdictional Statement, pp. 31-58, the First Circuit's opinion cannot be harmonized with the Establishment Clause opinions of this Court. Despite Grendel's recharacterization of the

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[3/] In similar fashion, Grendel's distorts the statutory language by the excision of "schools" from each of its quotations from the statute. See M.T.A. Question Presented and p. 4. Such selective quotation reflects Grendel's realization that the Legislature's inclusion of schools in the statutory scheme demonstrates its concern with the public health, safety, and welfare, rather than with peculiarly religious considerations. See generally Jurisdictional Statement (J.S.) 50-51.

issue in due process terms, the First Circuit's decision must be measured by the principles which it purported to apply. By those standards, the First Circuit's rationale fails to accord due respect to zoning legislation and so requires review by this Court. See J.S. 31-55.[4]

II. DUE PROCESS PRINCIPLES DO NOT PROVIDE INDEPENDENT SUPPORT FOR THE JUDGMENT OF THE EN BANC PANEL.

Grendel's argues that the judgment below is independently supported by established Due Process principles.

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[4] Recently this Court indicated that the "provision of benefits to [a] broad spectrum of groups is an important index of secular effect." Widmar v. Vincent, 50 U.S.L.W. 4062, 4065 (Dec. 8, 1981). This case thus merits plenary consideration for the additional reason that it squarely presents the question which Widmar left unanswered, i.e., whether the size of the legislative class has controlling significance on the question of secular effect. See J.S. 50-53.

M.T.A., pp. 9-11. It therefore asserts that, whether or not §16C satisfies the Establishment Clause, this Court should summarily affirm the First Circuit's decision. Summary affirmance is, however, inappropriate because Grendel's Due Process claims are not properly before the Court. In any case, §16C withstands judicial review under the Due Process Clause.

First, the Court of Appeals declined to address Grendel's Due Process claims. App. 24A, n. 11. Its decision rests exclusively on Establishment Clause principles. Under these circumstances, it would appear that the appropriate remedy following a reversal would be to remand the case to the en banc panel for consideration of the Due Process issue. See

Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468 (1947). At a minimum, however, the Court should permit the parties to brief and argue the issue prior to any affirmance on that ground. See, e.g., Dandridge v. Williams, 397 U.S. 471, 475 (1970).[5/]

In any case, the statute does not violate the Due Process Clause. Section 16C does not delegate to schools or churches any law-making or policy-making authority. Both the Supreme Judicial Court and the original First Circuit panel interpreted §16C as simply per-

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[5/] Moreover, summary affirmance on the Due Process issue would seem inappropriate given that the only two appellate panels to address the issue found no Due Process violation. See Grendel's I, 662 F.2d at 90-95, App. 38A-64A; Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E. 2d 1223, 1225-1228 (1979), App. 164A-180A.

mitting the protected institutions to waive an already imposed legislative restriction. Grendel's I, 662 F. 2d at 93-94, App. 55A-56A; Arno, 384 N.E. 2d at 1227-1228, App. 178A.[6/] In this regard, §16C functions like the ordinance in Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). The ordinance in Cusack permitted home owners to modify a legislative prohibition "with the consent of persons most affected by the modification." Id. at 531. As explained in subsequent cases, legislative provisions which permit individuals to "simply waive an otherwise applicable legislative

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[6/] The Due Process discussion which follows is meant to supplement the more comprehensive treatment given to the issue by the First Circuit in Grendel's I, 662 F. 2d at 90-95, App. 39A-64A, and by the Supreme Judicial Court in Arno, 384 N.E. 2d at 1225-1228, App. 164A-180A.

limitation . . . [do] not delegate legislative authority at all." City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1976); Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363, 368 (E.D. Mich. 1974), aff'd on other grounds sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). See also Currin v. Wallace, 306 U.S. 1, 15 (1939); Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936).

Like the ordinance in Cusack, §16C merely operates to allow pre-existing schools and churches to waive a restriction created by the Legislature; it does not allow schools or churches to impose a restriction of their own choosing. A review of the legislative progression culminating in the present form of §16C supports this view. See Arno, 384 N.E. 2d at 1226-1227, App. 172A-178A; Grendel's I, 662 F. 2d at 93-94, App. 52A-56A.

Initially, the statute imposed a categorical prohibition on liquor licenses within 500 feet of a church or school. In 1968, the statute was amended to allow churches and schools to waive this prohibition by written assent. However, the burden was on the applicant to solicit this assent. While the statute still requires the consent of the church or school, it now shifts the burden of formal objection to the church or school.

This liberalization from an absolute ban to the present version was accomplished without changing the "essential legislative mandate that no license be granted within the protected area in the face of a nonconsenting church." Arno, 384 N.E. 2d at 1228, App. 178A. The present version merely alters the mechanism by which consent is acquired. Id. If these institutions want to invoke the protection granted them under the statute, they are required to object at the appropriate time. They enjoy no legislative or policy-making authority; their participation is tightly confined to silence, assent or objection. If they do not object, their silence is taken as a waiver of the protection.[7] The fact that a private party may forego an otherwise valid legislative protection does not make the statute invalid. New Motor Vehicle Board of California v. Orrin W. Fox, 439 U.S. 96, 109 (1978) (an otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forego its protection); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 698 n. 12 (1976). Thus, the lasting lesson of Cusack is that statutes such as M.G.L. c. 138, §16C, which permit private interests to waive a zoning or licensing prohibition, do not constitute delegations of legislative power.

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[7] Grendel's, at this time, presses only its facial challenge to the statute; thus, there is no question that the church used the statute in a legal manner and for legitimate police power reasons. Compare Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Since §16C does not delegate legislative authority to churches or schools, the Due Process Clause does not provide an independent ground upon which the First Circuit's judgment could be affirmed.[8]

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[8] Because §16C does not delegate law-making authority to private entities, cases such as Eubank v. City of Richmond, 226 U.S. 137 (1912), and City of Eastlake v. Forest City Enterprises, Inc., 426 U.S.668 (1976), are inapposite. See generally Grendel's I, 662 F. 2d at 91-93, App. 40A-51A. In Eastlake, the Court upheld a city charter provision which required zoning changes to be ratified by 55% of the votes cast in a citywide referendum. In upholding the charter provision, the Court indicated that a citywide referendum was a proper mechanism for creating citywide zoning policy. Eastlake does not impugn the holding in Cusack and is inapplicable when the provision under consideration delegates no policy-making authority.

CONCLUSION

For the reasons stated above as well as those articulated in the Commission's Jurisdictional Statement, the Court should note probable jurisdiction and set the case for argument. In addition, the Court may wish to consider summary reversal.

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QUESTION PRESENTED

Whether a state may within the limits imposed by the Establishment Clause accommodate the diverse interests of its citizens through a zoning statute which shields objecting schools and churches from the disturbances associated with the distribution and consumption of liquor within their immediate vicinity.

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NO. 81-878
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS and
SUSAN R. BENDER as they are the members
of the MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, and the CAMBRIDGE
LICENSE COMMISSION,

Appellants,

v.

GRENDEL'S DEN, INC.,

Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE APPELLANTS

OPINIONS BELOW

The United States Court of Appeals for the First Circuit has rendered two opinions in this case. The decision of the original panel of the Court of Appeals (Grendel's I) is reported at 662 F. 2d 88. J.S.A. 31A-99A.[1] The en banc panel's decision (Grendel's II) is reported at 662 F. 2d 102. J.S.A. 1A-30A.

The opinion of the District Court is reported at 495 F. Supp. 761. J.S.A. 101A-143A.

JURISDICTION

The present appeal is from a final judgment of an en banc panel of the United States Court of Appeals for the First Circuit. J.S.A. 152A. That

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[1] Throughout their brief, the state appellants will use the following designations:

Jurisdictional Statement	J.S.
Appendix to the Jurisdictional Statement	J.S.A.
Joint Appendix	J.A.
Motion to Affirm	M.T.A.
Statutory Appendix	S.A.

judgment vacated a prior opinion by the Circuit Court and affirmed an earlier judgment of the United States District Court for the District of Massachusetts holding that Massachusetts General Laws c. 138, §16C, was unconstitutional. The judgment of the en banc panel was entered on July 28, 1981. J.S.A. 151A-152A. The members of the Massachusetts Alcoholic Beverages Control Commission (the Commission) filed their notice of appeal on August 11, 1981. J.S.A. 153A.[2/] An

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[2/] The Cambridge License Commission (the CLC) filed its notice of appeal on August 12, 1981. J.S.A. 157A. The individual members of both the state and local agencies were sued by name in their official capacities. The members of the Commission are named in the caption. Louis A. Cassis and Susan R. Bender are substituted for Herbert N. Goodwin and Fletcher H. Wiley pursuant to Sup. Ct. R. 40.3. The members of the CLC are Anthony Paolillo, Daniel Reagan, and Mary Colnan.

application for an extension of time to docket the appeal was filed with this Court on October 19, 1981, and allowed by order of Brennan, J., on October 20, 1981. The appellants then docketed their appeal on November 12, 1981. This Court noted probable jurisdiction on January 11, 1982. 50 U.S.L.W. 3528. Jurisdiction to hear this appeal is conferred by 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Tenth, Fourteenth and Twenty-first Amendments to the United States Constitution. At issue in the case is the validity of Massachusetts General Laws c. 138, §16C (West 1974).

The text of the relevant constitutional and statutory provisions involved are reproduced in a separate appendix at the end of this brief.[3/]

STATEMENT OF THE CASE

I. Prior Proceedings

Following the denial of its application for a liquor license by the CLC and the Commission, the appellee, Grendel's Den, Inc. (Grendel's), filed its complaint in the United States District Court for the District of Massachusetts on November 7, 1977. J.A. 1, 9-25. Grendel's challenged the validity of Massachusetts General Laws c. 138, §16C,

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3/ Also set forth in the Statutory Appendix are the texts of other relevant Massachusetts statutes.

which prohibits the issuance of a liquor license to any applicant whose place of business is within a five-hundred-foot radius of an objecting church or school. Asserting jurisdiction under 28 U.S.C. §§1331 and 1343(3) (1976) as well as 15 U.S.C. §15 (1976), the complaint alleged that §16C violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, the Establishment Clause of the First Amendment,[4] and the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. J.A. 18-20.

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[4] Grendel's also alleged that the statute violated the cognate provisions of the Massachusetts Constitution. J.A. 18-20. These pendent state claims were abandoned following the Massachusetts Supreme Judicial Court's decision in Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E. 2d 1223 (1979), J.S.A. 161A-186A, which upheld the constitutionality of §16C on both federal and state grounds.

Grendel's challenged the constitutionality of §16C both on its face and as applied. J.A. 18-20. It alleged that certain members of the objecting church in this case, the Holy Cross Armenian Catholic Parish Church (Holy Cross), were competitors of Grendel's and that the Church had objected in order to promote the commercial interests of those persons. J.A. 16, ¶12.

In response to the complaint, the Commission filed a motion to dismiss. J.A. 26-30. In its motion, the Commission asserted that Grendel's failed to state a claim since §16C did not violate either the antitrust laws or the United States Constitution. The Commission also asserted that the state's conceded power under the Twenty-first Amendment to prohibit the sale of liquor near churches and schools included the lesser power to permit such sales upon the consent of the affected institutions. Finally, the Commission stated that, as a matter of comity, the District Court should abstain from hearing these claims.[5/] Subsequent to the filing of the motion to dismiss, the parties agreed to continue the case pending the Massachusetts Supreme

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[5/] The Commission asserted three grounds for abstention: first, the pendency of Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E. 2d 1223 (1979); second, Grendel's failure to raise its as applied claims concerning the church's improper motive before the Commission; and third, the uncertainty regarding the Commission's authority to reject an objection filed solely to advance the business rivals of the license applicant. J.A. 28-29. Later, the Commission amended its motion to dismiss to assert that the District Court lacked jurisdiction since Grendel's had failed to exhaust its state judicial remedies. J.A. 43-44.

Judicial Court's decision in Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 384 N.E. 2d 1223 (1979). Following the Arno decision, which upheld the constitutionality of §16C, the District Court denied the motion to dismiss.

The parties subsequently agreed to present, as an initial matter, only Grendel's facial claims to the District Court.[6/] The parties entered into a Statement of Agreed Facts, J.A. 48-52, and an Agreed Statement of Contested Claims. J.A. 45-47. Each party then moved for partial summary judgment. J.A. 73-81. On August 4, 1980, the District

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[6/] This agreement was made through a stipulation of contested claims. J.A. 45-47. Since the parties raised only Grendel's facial claims, the as applied claims remain open for further litigation in the event of a reversal of the District Court's judgment.

Court issued its opinion and entered an order granting Grendel's motion. J.S.A. 101A-143A. The Court rejected the Commission's Twenty-first Amendment argument and held that §16C violated both the Due Process Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment. J.S.A. 118A-119A, 143A.[7] The Court then entered final judgment for Grendel's. J.A. 82-84.

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[7] The Court also found that Grendel's was not precluded from pursuing its antitrust claims by the state action doctrine of Parker v. Brown, 317 U.S. 341 (1942). J.S.A. 138A-142A. However, the Court determined that §16C did not violate the Equal Protection Clause. J.S.A. 134A-138A. On September 5, 1980, the District Court amended its order upon the Commission's motion to include a certification under 28 U.S.C. §1292(b) of the antitrust issue.

The Commission appealed from the District Court's judgment. J.A. 85. On April 7, 1981, the First Circuit, in a split decision, reversed. Grendel's I, 662 F. 2d 88, J.S.A. 31A-100A. The Court held that §16C did not violate the Due Process Clause since it was "a reasonable means of regulation in an area where states have wide latitude to regulate, and [is] not dissimilar to schemes commonly used in the fields of licensing and zoning." Id. at 95, J.S.A. 63A-64A. The Court also held that §16C did not violate the Establishment Clause because it did not have the primary effect of advancing religion. Id. at 96, J.S.A. 67A-68A.[8]

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[8] The First Circuit agreed with the District Court's antitrust analysis. Id. at 99-100, J.S.A. 138A.

Following the First Circuit's decision, Grendel's filed a petition for rehearing en banc which was granted. J.S.A. 149A.[9] On July 28, 1981, the en banc panel, in a split decision, held §16C to be unconstitutional. Grendel's II, 662 F. 2d 102, J.S.A. 1A-30A.[10] The majority held that §16C provided a benefit to churches which had more than a remote or incidental effect in advancing religion. Id. at 104-105, J.S.A. 11A-15A. The majority also held that

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[9] Grendel's had also filed a petition for rehearing which was denied on the same day. J.S.A. 145A-147A.

[10] The en banc panel was formed by substituting Judge Bownes for Judge Hoffman of the Eastern District of Virginia who had sat on the original panel. Chief Judge Coffin, who had dissented in Grendel's I, and Judge Campbell, who had written the majority opinion in Grendel's I, remained as members of the panel.

§16C "distributes its benefits on an explicitly religious basis [emphasis in original]." Id. at 105, J.S.A. 15A. On these grounds, the majority concluded that "section 16C has a 'primary' or 'principal' effect of advancing religion." Id. at 106, J.S.A. 21A.[11]

Citing the checkered judicial treatment of §16C, the Commission sought and obtained a stay of mandate during the pendency of this appeal.

II. Statement of Facts.

The record consists of a statement of agreed facts. J.A. 48-52. On May 13, 1977, Scorpio's, Inc., a holder of an all-alcoholic-beverages restaurant license, applied to the CLC for approval of the transfer of its license to Grendel's. J.A. 50, ¶5. Notice of the transfer was published in a local newspaper; also, in accordance with Massachusetts General Laws c. 138, §15A, notice was sent to all abutting property owners, and to any school, hospital, or church within a five-hundred-foot radius of Grendel's. J.A. 50, ¶6.

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[11] The en banc panel did not reach the due process issue; nor did it consider the antitrust issue. Grendel's II, 662 F. 2d at 104, 107 n. 11, J.S.A. 9A, 24A, n. 11. Thus, neither claim is an issue in this appeal.

In response to this notice, Holy Cross, which is located ten feet from Grendel's, sent a letter of opposition to the CLC. J.A. 51, ¶7, J.A. 53, Exhibit A.[12/] In its letter, Holy Cross

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[12/] The initial letter of opposition by Holy Cross was rejected by the CLC for not properly indicating due authorization from the Church's governing body. J.A. 51, ¶7.

expressed its concern over "having so many licenses so near" and opposed Grendel's application because it "already ha[d] plenty of noise, dirt, and abuse from Grendel's Den, Inc." Id.

Pursuant to Massachusetts General Laws c. 138, §16C, the CLC denied the transfer. J.A. 51, ¶9; J.A. 54-55, Exhibit B. Thereafter, both Grendel's and Scorpio's, Inc. appealed to the Commission. J.A. 52, ¶10; J.A. 56, Exhibit C. Following a hearing on September 8, 1977, J.A. 57-64, Exhibit E, the Commission sustained the denial of the transfer. J.A. 65, Exhibit D. Grendel's then filed its complaint in the District Court.

SUMMARY OF ARGUMENT

Massachusetts General Laws c. 138, §16C, is a religiously neutral law designed [illegible] separate incompatible land uses. Section 16C serves a police power function. Most states have statutes which, like §16C, insulate churches and schools from liquor-serving establishments. The form of the legislative protection varies among the states. These differences reflect varying community needs and values.

Massachusetts has a legislative policy of protecting individuals attending spiritual, cultural and educational centers from the noise and distractions associated with liquor outlets. In accordance with that policy, the Legislature prohibits the issuance of a liquor license to premises located within five-hundred feet of a non-consenting church and school. Since the Massachusetts Legislature could constitutionally prohibit all liquor sales within a five-hundred-foot radius of a church or school, it must necessarily have the power to permit such sales on the condition that those institutions waive their legislative protection. Recent amendments to §16C have been favorable to license applicants and the history of the statute reflects an accommodation of competing land-use interests. The balancing of the interests involved is exclusively a legislative function, and the rough accommodation worked out by the Massachusetts Legislature is entitled to judicial deference.

Section 16C does not violate the Establishment Clause because §16C does not foster any of the evils which the Establishment Clause proscribes. It does not provide financial support to religious institutions. Nor does it place governmental support behind religious doctrine or engender state involvement in religious activity. More specifically, §16C passes each element of the three-part test for determining whether governmental action violates the Establishment Clause.

Grendel's concedes that §16C has the secular purpose of protecting diverse cultural, educational and spiritual centers from the disturbances associated with liquor distribution and consumption.

The *en banc* panel reasoned that, since §16C extended a more than *de* minimis benefit to churches, it had some effect of advancing religion and thus violated the Establishment Clause. In adopting the premise that §16C extends a more than de minimis benefit to religious institutions, the en banc panel mischaracterized §16C. Contrary to the lower court's view, §16C does not vest a "specialized political power" in churches. The statute merely permits churches and schools to waive a legislative protection. Zoning statutes which regulate uses which may interfere with other land uses are neither uncommon nor considered to be a grant of specialized political power. Section 16C does extend to churches and schools the benefit of a liquor-free zone which may make church attendance more pleasing and serene to the community. However, such an aesthetic benefit does not have the primary effect of advancing religion and the _en banc_ panel's view cannot be reconciled with the more tangible benefits previously permitted by this Court's precedents.

Contrary to the _en banc_ panel's holding, classifications which include religious institutions but not all other similarly situated institutions do not necessarily violate the Establishment Clause. While the size of the benefited class may indicate whether a benefit has been extended to religious institutions as such, it is the nature of the benefit which determines whether the benefit advances religion. Moreover, religious classifications in land-use statutes do not impermissibly impair Establishment

Clause interests. In our society, land-use planners must decide which land areas should be allocated for religious activities. The en banc panel's analysis would preclude land-use planners from insulating churches from other incompatible uses, no matter how incompatible those uses might be.

The Commission next demonstrates that §16C does not produce an excessive entanglement. The relationship between churches and the state created by §16C is limited to the church's written objection. This narrow relationship does not produce excessive entanglement. In fact, this mechanism avoids entanglement and the potential for political divisiveness on a religious basis since the licensing authorities would otherwise have to weigh and evaluate a church's objection at a public hearing.

In its final argument, the Commission responds to Grendel's assertions in its motion to affirm that the en banc panel's judgment is supportable on Due Process grounds. Since the en banc panel did not reach this issue, the claim is not properly before the Court. In any event, §16C does not delegate legislative power to churches and schools. Section 16C merely permits such institutions to waive a legislative restriction upon the sale of intoxicating liquors. In this regard, §16C operates in the same way as the ordinance in Cusack v. City of Chicago, 242 U.S. 526 (1917). Such consent mechanisms are not uncommon in land-use regulations concerning uses which may have deleterious effects upon existing uses. They do not violate the Due Process Clause.

ARGUMENT

This case stands at the confluence of four constitutional provisions. As framed by the complaint, the case involves the Due Process Clause and the Establishment Clause. Its subject matter implicates the state's power under the Twenty-first and Tenth Amendments. The original panel of the First Circuit found §16C to be a reasonable and proper exercise of the police power. The three judge *en banc* panel, without discussing the state's police power, held that §16C violated the Establishment Clause.

In order to set the stage for its discussion of the Establishment Clause, the Commission will first examine the police power underlying §16C. The Commission will then demonstrate that §16C does not violate the Establishment Clause. Finally, in response to Grendel's motion to affirm, the Commission will argue that Due Process principles do not provide an independent ground for affirming the en banc panel's judgment.

I. SECTION 16C IS A LEGITIMATE EXERCISE OF THE STATE'S POLICE POWER TO CONTROL THE DISTRIBUTION OF ALCOHOLIC BEVERAGES.

A. The States Have Consistently Protected Churches and Schools From the Disturbances Associated With the Distribution and Consumption of Alcoholic Beverages.

A state's police power has long included the ability to control and regulate the distribution of liquor within its borders. See Mugler v. Kansas, 123

U.S. 623, 662 (1887).[13] With the passage of the Twenty-first Amendment, the police power encompasses "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). States may prohibit distribution absolutely or permit distribution under explicit conditions. New York State Liquor Authority v. Bellanca, ___ U.S. ___, 101 S. Ct. 2599 (1981); Ziffrin v. Reeves, 308 U.S. 132, 138-139 (1939).

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[13] This power is inherent in those powers reserved to the states by the Tenth Amendment. See Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919).

The states have consistently exercised this power to provide valued institutions with zones of protection from the disturbances which accompany liquor consumption. Recognizing that such disturbances can interfere with the legitimate activities of their citizens, most states provide some form of insulation from liquor-serving establishments.[14]

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[14] I.e., ALA. CODE §28-3-17 (1975); ALASKA STAT. §04.11.410 (1980); ARIZ. REV. STAT. ANN. §4-207(A)(1956); ARK. STAT. ANN. §48-345 (1977); CAL. BUS. & PROF. CODE Ch. 5, §23789 (1975); COLO. REV. STAT. §12-47-138 (1973); CONN. GEN. STAT. §30-46 (1980); DEL. CODE ANN. tit. 4 §543 (1974); GA. CODE ANN. §5A-508 (1981); HAWAII REV. STAT. §281-56 (1975); IDAHO CODE §23-913 and §23-303 (1977); ILL. REV. STAT. ch. 43 §127 (1981-82); IND. CODE ANN. §7.1-3-21-11 (Burns 1978); KAN. STAT. ANN. §41-710 (1973); KY. REV. STAT. §243-220 (1981); LA. REV. STAT. ANN. tit. 26 §280 (West 1981); ME. REV. STAT. tit. 28 §301 (1964); MD. ANN. CODE ART. 2B §§46B, 47, 52A, 52C (1957); MASS. GEN. LAWS

(footnote continued)

The most carefully protected institutions have been churches and schools.[15] However, other types of institutions

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Ch. 138, §16C (West 1974); MICH. STAT. ANN. §18.988(1) (1980); MINN. STAT. ANN. §340.14 (West 1977); MISS. CODE ANN. §67-1-51 (1972); MO. REV. STAT. §311.080 (1959); MONT. CODE ANN. §16-3-306 (1981); NEB. REV. STAT. §53-177 (1981); N.H. REV. STAT. ANN. §177:1 (1977); N.J. STAT. ANN. §33:1-76 (West 1937); N.M. STAT. ANN. §60-6B-10 (1981); N.Y. ALCO. BEV. CONT. LAW, ART. 5, §64 and ART. 8, §105 (McKinney 1970); N.C. GEN. STAT. §18A-40; OHIO REV. CODE ANN. §4303.26 (Page 1973); OKLA. STAT. ANN. tit. 37, §534(c) (West 1951); PA. CONS. STAT. ANN. §4-404 and §4-432(d) (Purdon 1969); R.I. GEN. LAWS §3-7-19 (1981); S.C. CODE ANN. §61-3-440 (Law Co-op. 1976); S.D. CODIFIED LAWS §35-2-6.1 (1977); TEX. ALCO. BEV. CODE ANN. tit. 4, §109.33 (Vernon 1976); UTAH CODE ANN. §16-6-13.5 (1981); VERMONT STATE LIQUOR CONTROL BOARD REGULATIONS, para. 39; VA. CODE §4-31 (1979); WASH. REV. CODE ANN. §66.24.010(9) (1962); W. VA. CODE §11-16-12 (1974); WIS. STAT. ANN. §176.05 (9m) (West 1974). See also GUAM CIV. CODE §25208(a) (1972); P.R. LAWS ANN. Ch. 505, §6080 (1980).

[15] Of the statutes cited in n. 14, only those of Colorado, Minnesota and South Dakota do not include churches within
(footnote continued)

may be included.[16] Similarly, the form of the restriction or limitation varies widely. Twenty-one states

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(footnote continued)

their protection. Colorado extends protection only to schools and seminaries. Minnesota and South Dakota extend statewide protection only to schools, but local governments may impose a similar restriction encompassing churches. Infra, n. 20. Twenty-four states extend the protection only to churches and schools, i.e., Alaska, Arizona, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Vermont, Washington, and West Virginia. See also Puerto Rican statute.

[16] The statutes of Guam and Wisconsin include hospitals with schools and churches. The Louisiana and Utah statutes encompass libraries as well as churches and schools. Mississippi protects not only churches and schools, but also funeral homes. In addition to protecting churches and schools, Nebraska and Illinois protect hospitals as well as homes for the aged, for indigents, and for veterans. The Illinois statute also includes naval and military stations. Alabama protects all charitable institutions.

prohibit, without possibility of waiver, the issuance of a liquor license within the immediate vicinity of the protected institution.[17/] Nine states, like Massachusetts, permit a waiver of the legislative restriction if the protected institution either gives its assent or does not file an objection to the issuance of the license.[18/] Other states do not treat the distances from the protected institution as conclusive, but

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[17/] I.e., Alabama, Alaska, Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, Utah, West Virginia and Wisconsin. Texas and Louisiana delegate to their cities and towns the authority to impose a total prohibition around these institutions.

[18/] I.e., Arizona, Kentucky, Maine, Maryland, Michigan, Missouri, New Jersey, Vermont and Washington. Guam also permits a waiver of the restriction.

specifically authorize the licensing authority to refuse a license if the liquor outlet is in close proximity to a school, church or other institution.[19/] In the remaining states, protection may be afforded at the local level.[20/]

[19/] I.e., California, Connecticut, Delaware, Hawaii, Idaho, North Carolina, Ohio, Pennsylvania, Virginia and also Puerto Rico. One state, North Carolina, prohibits liquor licenses within 15 meters of a church or school unless the responsible state board finds that the "establishment is a suitable one and that the failure to issue a permit will result in undue hardship."

[20/] The remaining states authorize local governmental bodies to control the distribution and placement of liquor-serving establishments. See FLA. STAT. §562.45(2) (1982); IOWA CODE ANN. §123.39 (1981); N.D. CENT. CODE §5-02-09 (1975); OR. REV. STAT. §471-1, et. seq. (1979; S.D. CODIFIED LAWS ANN. §35-3-1 (1977); TENN. CODE ANN. §57-5-105 (1980); WYO. STAT. §12-4-101 (1977). See also Horne v. Hernando County, 297 So. 2d 606 (Fla. Dist. Ct. App. 1975) (ordinance prohibiting the issuance of license within 1500 feet of a church); Davis v. Blount County Beer Board, 621 S.W. 2d 149

(footnote continued)

Although these statutes do not share a uniform design, they do share a common purpose and a common historical background. Each statute separates and protects selected institutions from the incompatible activities of liquor distribution and consumption. The statutes reflect the fundamental agreement that, in our pluralistic society, certain institutions need a particular environment to carry out their legitimate activities.

(footnote continued)

(Tenn. 1981). Although the Minnesota statute includes only schools, municipalities may protect churches. See County Liquors v. City Council of Minneapolis, 264 N.W. 2d 821 (Minn. 1978) (ordinance prohibiting liquor licenses within 300 feet of a school or church). While Nevada generally delegates this authority to its county officials, it does prohibit liquor from being distributed within one mile of an ongoing prayer meeting, NEV. REV. STAT. §201.280 (1967), and within one-half mile of a state prison, NEV. REV. STAT. §212-180 (1979).

B. Massachusetts Has Adopted A Comprehensive Scheme for the Regulation of the Distribution of Liquor.

By Chapter 138 of the Massachusetts General Laws, the Legislature has defined the conditions under which liquor may be sold in Massachusetts. Arno, 384 N.E. 2d at 1226, J.S.A. 167A-168A. The premise of that regulatory scheme is that alcoholic beverages may not be sold unless the seller has obtained a license.[21/] The Legislature has delegated the authority to issue liquor licenses to local boards in the cities or towns which have elected to permit the distribution of liquor within their

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[21/] Mass. Gen. Laws. c. 138, §2 (West 1974). See Commonwealth v. Blackington, 41 Mass. 352, 24 Pick. 352 (1837). Under Massachusetts law, liquor licenses are issued solely for the public need and convenience and do not possess the character of a property interest. Mass. Gen. Laws c. 138, §23 (West 1974), S.A. 5a.

boundaries.[22] However, the Legislature restricts the local board's authority to grant liquor licenses by a number of statutory provisions.[23] Section 16C is one such provision. It prohibits local licensing boards from issuing liquor licenses to establishments located within a five-hundred-foot radius of a non-consenting church or school. *See Arno*, 384 N.E. 2d at 1228, J.S.A. 178A.[24] The Legislature has determined that, when a pre-existing religious or educational institution objects to the sale of alcoholic beverages within close proximity, the public interest warrants the prohibition of such sales. At the same time, the Legislature has also accommodated the interests of liquor vendors. The statute's history reflects a progressive relaxation of the licensing limitation. Id. As originally enacted in 1954, §16C provided that "premises, except those of an innholder, within five hundred feet . . . of a church or school shall not be licensed for the sale of alcoholic beverages . . . ." 1954 Mass. Acts c. 569, §1, S.A. 6a. In 1968, the Legislature amended this categorical proscription to permit licensing within the five-hundred-foot radius "if the governing body of such church or school assents in writing . . . ." 1968 Mass. Acts. c. 435, S.A. 7a. Finally, by 1970 Mass. Acts. c. 192, §1, the Legislature substituted the present language which relieved the applicant of the duty to gain assent and imposed the burden of formal objection upon the church or school. S.A. 8a. See generally, Arno, 384 N.E. 2d at 1226-1227, J.S.A. 171A-172A.[25/] In short, the current provision is a modern calibrated effort to accommodate competing interests and acts as a less restrictive alternative to a broad ban on the sale of liquor.

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[22] Mass. Gen. Laws c. 138, §§12 and 15 (West 1974). Many cities and towns within Massachusetts do not permit the distribution of liquor within their boundaries. Belmont, Carlisle, Chilmark, Dunstable, Gay Head, Harvard, Lincoln, Rockport, Weston and Westwood have voted, pursuant to Mass. Gen. Laws c. 138, §§ 11 and 11A (West 1974), not to permit such activity.

[23] For instance, the Legislature forbids licensing boards from issuing: (1) more than three licenses to the same person, firm, corporation, or association (Mass. Gen. Laws c. 138, §15 (West 1974)); (2) licenses to bowling alleys or to buildings used for similar purposes (Mass. Gen. Laws c. 138, §16D (West 1974)); (3) licenses to any applicant once the quota on the number of licenses imposed by Mass. Gen. Laws c. 138, §17 (West 1974), for the particular city or town has been filled.

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[24] In general, the Legislature has delegated to local boards the power to prohibit liquor distribution within certain areas of their community. Thus, the local authorities are authorized to "refuse to grant licenses under [c. 138] in certain geographical areas of their respective cities or town, where the character of the neighborhood may warrant such refusal." Mass. Gen. Laws. c. 138, §12, ¶8 (West 1974). However, with respect to licenses issued within the proximity of churches and schools, the Legislature has retained for itself the power of restriction. Of course, the local licensing board is authorized to deny an application on the ground that the premises to be licensed are within the proximity of a church or school, even if the premises are outside the statutory circle of prohibition.

[25/] At the time that it was making these changes to §16C, the Legislature was careful to respect the interests of existing licensees. Establishments antedating §16C's enactment or preceding the establishment of a church or school within the five-hundred-foot radius have always been exempt from the statute. 1954 Mass. Acts. c. 569, §2. And, by its terms, §16C affects only the initial issuance of a license within the protected zone, not its renewal or transfer within that zone.

Had the Legislature so chosen, it could have totally prohibited the sale of intoxicants near these institutions on the ground of their general likelihood to impinge upon the established religious, educational and social activities of the members and children of a neighboring congregation.[26] Instead, the Legislature adopted the less drastic scheme of allowing the protected institution itself, as the party most knowledgeable about its own exposure to injury, to waive the restriction. A state having the power to prohibit the sale of intoxicants necessarily has the power to permit such activity under prescribed conditions since the greater power includes the lesser. New York State Liquor Authority v. Bellanca, 101 S. Ct. at 2601. The measure is well within the state's police power to regulate the geographical location of traditionally offensive commercial activity. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 491 (1955).

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[26] See Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 763 (D. Mass. 1980), J.S.A. 109. Accord, California v. LaRue, 409 U.S. 109, 120 (1972)(Stewart, J., concurring); cf. Sandbach v. City of Valdosta, 526 F. 2d 1259 (5th Cir. 1976); Blackman v. City of Big Sandy, Texas, 507 F. 2d 935 (5th Cir. 1975). See also 45 Am. Jur. 2d Intoxicating Liquors, §140 (1969).

C. The Means By Which a State Protects its Valued Institutions from the Annoyances Associated With Liquor Consumption is Entitled to Judicial Deference.

Section 16C involves a legislative judgment in the nature of land-use planning. The Massachusetts Legislature has determined that individuals attending spiritual, cultural and educational centers should be protected from the activity and noise associated with liquor distribution. See Arno, 384 N.E. 2d at 1226-1228, J.S.A. 171A-178A; Grendel's I, 662 F. 2d at 11, J.S.A. 55A-56A. In designing this protection, the Legislature attempted to accommodate the interests of both the liquor licensees and the pre-existing institutions. It has done so by protecting the senior land use whether that use consists of liquor distribution or the operation of schools or churches. Supra, n. 25. That judgment is entitled to deference from this Court.

States have wide latitude under the Twenty-first Amendment "as to the choice of means to accomplish a permissible end." California v. LaRue, 409 U.S. 109, 116 (1972). The different schemes by which states protect valued institutions from the activity and noise associated with liquor distribution illustrate the variety of means available to accomplish this end.[27] These differing designs reflect the differing community needs.[28] These differences also illustrate the flexible nature of land-use control and zoning. See Gorieb v. Fox, 274 U.S. 603, 608 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87

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[27] Supra, pp. 28-33.

[28] The Maryland statutory scheme provides an excellent example of how these statutory provisions reflect community values and needs. In Maryland, the design of the protection varies from county to county. M.D. ANN. CODE ART. 2B, §46-§53. For instance, in Baltimore, the statute permits churches and schools to waive a three-hundred-foot restriction (§46B); in Anne Arundel County, no license may be issued within 1000 feet of a church or school (§46); in Dorchester County, licenses are prohibited within 300 feet of a church or school (§50); and in Queen Anne's County, no license may issue within 500 feet of a church, school, library or youth center (§52C).

(1926).

All land-use legislation requires a balancing of competing considerations.[29] The Legislature alone possesses the institutional competence to reconcile these competing interests and to frame workable solutions. As this Court has observed before, "it is because legislators and administrators are properly concerned with balancing numerous considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." Village of Arlington Heights v. Metropolitan Housing Corp.,

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[29] N. Williams, Jr., AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER, §1.01, pp. 3-4 (1974). Grendel's II, 662 F. 2d at 108 (Campbell, J., dissenting), J.S.A. 29A-30A (the decisions to be made "are part of a zero sum game where success on one side means loss on the other").

429 U.S. 252, 265 (1977).[30/] Where, as here, the Legislature has developed a workable scheme of "'rough accommodation' of interests in an effort to arrive at practical and workable solutions,"[31/] the Court should defer to that

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[30/] Moreover, state statutes regulating liquor distribution are presumed valid and may only be invalidated upon a strong showing of irrationality. New York State Liquor Authority v. Bellanca, 101 S. Ct. at 2601; McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). Of course, where a statutory provision infringes upon a fundamental right, heightened scrutiny is required. Craig v. Boren, 429 U.S. 190, 208 (1976). Similarly, when a state regulates more than the mere distribution of liquor and its regulations conflict with federal policy, the state may be required to demonstrate a strong state interest. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110, 113 (1980).

[31/] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 55

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legislative determination. In this case, principles of federalism and separation of powers compel deference to a legislative determination which serves the legitimate governmental purpose of protecting "spiritual, cultural and educational centers from the 'hurly-burly' associated with liquor outlets." Grendel's Den, Inc., 495 F. Supp. at 761, J.S.A. 125A. The next section will show that the analysis of the en banc panel was far from deferential. On the contrary, the en banc panel "strain[ed] to find an [E]stablishment [C]lause violation".[32]

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(1973). See also Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[32] Grendel's II, 662 F. 2d at 107, (Campbell, J., dissenting), J.S.A. 25A.

II. SECTION 16C SATISFIES EACH ELEMENT OF THIS COURT'S TRIPARTITE TEST FOR DETERMINING THE VALIDITY OF GOVERNMENT ACTION UNDER THE ESTABLISHMENT CLAUSE.

A proper analysis of the relationship of §16C to the Establishment Clause begins with the recognition that the subject matter involves a question of degree. Meek v. Pittenger, 421 U.S. 349, 359 (1975); Zorach v. Clauson, 343 U.S. 306, 314 (1952). In its decisions, the Court has avoided "categorical imperatives and absolutist approaches at either end of the range of possible outcomes." Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980). The Court's decisions instead reflect a sensitive case-by-case analysis of the proper relationship between church and state. See generally Roemer v. Board of Public Works of

Maryland, 426 U.S. 736 (1976). Its decisions demonstrate that the line of separation, "far from being a 'wall' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The fundamental question is whether the particular relationship furthers any of the evils against which the Establishment Clause protects. These evils consist primarily of "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970).[33] The Court has settled upon a three-part test for answering this fundamental question and thus determining the constitutionality of government action under the Establishment Clause:

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[33] See also Meek v. Pittenger, 421 U.S. 349, 359 (1975); Committee for Public Education v. Nyquist, 413 U.S. 756, 772 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

> In order to pass muster, a statute must have a secular legislative purpose, must have a primary effect which neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.34/

The following sections will demonstrate that §16C passes each element of this test. As a zoning statute, "designed to protect uses believed to require peace and quiet from more offensive and raucous uses, among the latter of which histori-

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34/ Wolman v. Walter, 433 U.S. 229, 236 (1977); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 748 (1976); and the cases cited above at n. 33.

cally liquor service stands preeminent,"[35/] §16C does not perpetrate any evil prohibited by the Establishment Clause.[36/]

A. Section 16C Has the Secular Legislative Purpose of Protecting Spiritual, Cultural and Educational Pursuits.

Grendel's has never claimed that §16C lacks a secular purpose. See Grendel's

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[35/] Grendel's II, 662 F. 2d at 107-08 (Campbell, J., dissenting), J.S.A. 26A-27A, 28A-29A. See also Arno, 384 N.E. 2d at 1226, 1228-1229, App. 168A-171A, 182A. See also Cleary v. Cardullo's, Inc., 347 Mass. 337, 345, 198 N.E. 2d 281, 287 (1964).

[36/] State courts which have addressed Establishment Clause challenges to similar statutes have upheld their constitutionality. See Davis v. Town of Wilmer, 376 So. 2d 698 (Ala. 1979); Wiles v. Michigan Liquor Control Commission, 59 Mich. App. 321, 229 N.W. 2d 434 (1975); Horne v. Hernando County, 297 So. 2d 606 (Fla. Dist. Ct. App. 1975); see generally, Annot., 119 A.L.R. 634, 644 (1939); 45 Am. Jur. 2d, Intoxicating Liquors, §140 (1969).

Den, Inc., 495 F. Supp. at 766-767. It concedes that "the saving secular purpose of Section 16C is to protect diverse centers of spiritual, educational and cultural enrichment." Grendel's Brief before the First Circuit, p. 13.

Religious organizations perform a variety of functions which enhance the quality of communal life. Walz v. Tax Commission, 397 U.S. 664, 687 (1970) (Brennan, J., concurring).[37/] Churches have themselves been a traditional center for communal activity. "[T]he same

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[37/] Religion itself constitutes an independent cultural value within our social framework. Id. at 689 (Brennan, J., concurring). The importance of a church's role in our secular society explains the preferred treatment which churches receive in zoning ordinances as compared to other places of assembly. See 2 A. Rathkopf, THE LAW OF ZONING AND PLANNING, §20.01 (3rd ed. rev. 1966) [hereafter Rathkopf].

people who gather in church facilities for exclusively religious worship and study may return to those facilities to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music."[38] A church thus serves as a center for secular activities beneficial to the community as a whole.

By its inclusion of public and private schools as well as churches, §16C reveals a broad non-sectarian purpose.[39] In addition to educating their students, schools similarly serve as a forum for a wide range of activities (e.g., continuing education, sports and cultural events, and community meetings). In short, the inclusion of schools as well as churches within §16C demonstrates the non-sectarian nature of its purpose.[40]

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[38] Walz, 397 U.S. at 688 (Brennan, J., concurring).

[39] In Massachusetts, schools were afforded protection from liquor-serving establishments long before it was extended to churches. By 1882 Mass. Acts c. 220, the Legislature prohibited the issuance of a liquor license to any building "on the same street within

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four hundred feet of any building occupied in whole or in part by a public school." During the era of prohibition, this statute, along with all other statutes regulating liquor distribution, was repealed. When the Legislature reinstituted such protection in 1954, it extended that protection to churches as well as schools. That churches were not added until 1954 reveals that the legislative motivation may have stemmed from postwar urbanization rather than religious tradition.

[40] Section 16C embodies a legislative classification similar to that upheld in Walz, where the majority acknowledged that:

(footnote continued)

Section 16C shields adults and children from the activity and traffic associated with liquor consumption while they use the church and school facilities as well as while they go to and from such facilities. Thus, §16C effectuates the Legislature's secular concern with the "improvement of the health, safety, recreation, and general well-being of [its] citizens." McGowan v. Maryland, 366 U.S. 420, 444 (1961).[41]

(footnote continued)

> The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable and in the public interest.

397 U.S. at 673. See also Arno, 384 N.E. 2d at 1228-1229, J.S.A. 182A-183A.

[41] In upholding the Sunday Closing Laws, the Court condoned laws which prohibited certain otherwise permitted activities within a prescribed distance from any church. See McGowan v. Maryland, 366 U.S. 420, 424, 445 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617, 621 (1961).

B. The Primary Effect of §16C Neither Advances Nor Inhibits Religion.

1. The benefit bestowed upon churches has only an incidental effect on the advancement of religion.

The Court has consistently rejected the notion that "the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation." Hunt v. McNair, 413 U.S. 734, 742 (1973). Instead, the Court examines the government program to determine if the benefit furthers an evil proscribed by the Establishment Clause.[42/] If the effect of the benefit is to ad-

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[42/] Meek v. Pittenger, 421 U.S. 349, 359 (1975) (each part of the three-part test serves to detect the furtherance of any evil against which the Establishment Clause protects).

vance one of those evils, then the program violates the Establishment Clause.

In contrast to this approach, the en banc panel found §16C to be violative of the Establishment Clause because it bestowed a more than de minimis benefit upon churches and thus had "some effect in advancing religion [emphasis in original]." The en banc panel's analysis reflects a wooden application of the primary effect test. Any benefit which is extended to a religious institution will, of course, have some favorable impact on that institution. The policeman who directs traffic on Sunday morning so that parishioners may cross the street to go to church does not, however, represent a violation of the Establishment Clause. Zorach v. Clauson, 343 U.S. 306, 312 (1952). The critical factor is the character of the benefit.[43] Like the benefit bestowed by the policeman assisting parishioners to church, the benefit provided by §16C has only a remote and incidental effect on the advancement of religion.

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[43] The First Circuit based its conclusion upon Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The teaching of Nyquist is not, however, that every state program which benefits religious institutions violates the Establishment Clause. Rather, its lesson is that states may not do indirectly that which they are prohibited from doing directly. See School District of Abington Township v. Schempp, 374 U.S. 203, 220 (1963) (Douglas, J., concurring). The fatal defect in the tax and monetary grant programs under review in Nyquist was the quality of the benefit conferred, namely, the state's subsidization of sectarian education. See also Levitt v. Committee for Public Education, 413 U.S. 472, 481 (1973) (distinguishing Everson and Allen because of the character of the state-supported activity). Accord Sloan v. Lemon, 413 U.S. 825, 832 (1973). Nyquist left undisturbed the many examples of direct and immediate benefits which the Court has held to be compatible with the Establishment Clause.

The en banc panel did not find that §16C bestowed a benefit of quantifiable value upon a church or school.[44] The impermissible benefit that the en banc panel discerned was the grant of a "specialized political power," Grendel's II, 662 F. 2d at 104, J.S.A. 12A, enabling churches to "confer or withhold an important commercial privilege." Id. at 105,

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[44] By its allusion to the sale of indulgences, the en banc panel could be understood to imply that the benefit conferred by §16C might be marketable. Grendel's II, 662 F. 2d at 104, J.S.A. 12A. The majority did, however, otherwise carefully avoid the egregious speculation of the District Court on this point, Grendel's Den, Inc., 495 F. Supp. at 767, J.S.A. 128A-129A. In any case, it did not rest its decision on such speculation. Since it was faced with a facial challenge to a police power statute, the en banc panel was required, before it could find §16C unconstitutional, to find that §16C could not operate validly under any circumstances. See McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). See also New York State Liquor Authority v. Bellanca, ___ U.S. ___, 101 S. Ct. 2599, 2601 (1981).

J.S.A. 14A. In this regard, however, the panel fabricated a benefit to churches by mischaracterizing the nature of §16C despite the governing interpretation provided by the Massachusetts Supreme Judicial Court in Arno.[45/] Contrary to the First Circuit's holding, §16C does not bestow any "specialized political power" upon churches. See Arno, 384 N.E. 2d at 1227, J.S.A. 178A; Grendel's I, 662 F. 2d at 90-95, J.S.A. 37A-64A. Land uses which have the potential to disrupt a community or interfere

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[45/] By declining to address the due process issues, the en banc panel avoided any direct inquiry into whether §16C entrusts a public power to private institutions. It is noteworthy that the panel simply ignored both appellate decisions which fully addressed the delegation issue and upheld §16C on that ground. See Grendel's I, 662 F. 2d at 90-95, J.S.A. 40A-64A; Arno, 384 N.E. 2d at 1225-1228, J.S.A. 164A-1[illegible]0A.

with existing land uses are often permitted only upon the consent of abutters or other affected individuals.[46] Such consent provisions simply permit the protected entities to waive a legislatively imposed restriction. See generally Arno, 384 N.E. 2d at 1225-1228, J.S.A. 172A-178A; Grendel's I, 662 F. 2d at 80-95, J.S.A. 53A-55A. They are not uncommon in the field of zoning and are not considered to be a grant of political power. Cusack v. City of Chicago, 242 U.S. 526 (1917). See Arno, 384 N.E. 2d at 1225-1228, J.S.A. 174A-175A.[47]

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[46] Rathkopf, supra, n. 37, at §29.05, p. 29-8.

[47] Rathkopf, supra n. 37, at §29.05. See discussion at pp. 87-104, infra.

Section 16C does, however, extend to churches and schools the benefit of a liquor-free zone. This zone of protection shelters a variety of secular activities. See, e.g., Walz v. Tax Commission, 397 U.S. at 688 (Brennan, J., concurring). Such a zone of quietude also serves to make religious activity itself more serene and pleasing to the community. The enhancement of such aesthetic dimensions does not, however, constitute a substantial benefit within the meaning of the Establishment Clause. Although the Sunday closing laws similarly enhance the serenity of religious activity, they are not deemed to benefit religion in violation of the Establishment Clause. McGowan v. Maryland, 366 U.S. 420 (1961). Section 16C, like the property tax exemption in Walz v. Tax

Commission, 397 U.S. 664 (1970), does not itself promote any particular activity of a religious organization, such as the propagation of its beliefs.

The en banc panel's definition of a substantial benefit for the purpose of its Establishment Clause analysis does not comport with this Court's precedents. The Court has upheld the use of public funds to reimburse parochial schools for administering state-mandated tests,[48] textbook loan programs for parochial schools,[49] the release of public school students during school hours for religious instruction,[50] public reimbursement of students attending parochial schools for their transportation costs,[51] non-categorical grants to church-affiliated colleges for non-sectarian purposes,[52] the issuance of public bonds to finance construction of non-sectarian facilities by church-affiliated colleges,[53] public construction grants to church-affiliated colleges for non-sectarian purposes,[54] property tax exemptions for religious organizations,[55] and restrictions upon commercial activity on Sunday.[56]

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[48] Committee for Public Education v. Regan, 444 U.S. 646 (1980).

[49] Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); and Board of Education v. Allen, 392 U.S. 236 (1968).

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[50] Zorach v. Clauson, 343 U.S. 306 (1952).

[51] Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947).

[52] Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

[53] Hunt v. McNair, 413 U.S. 734 (1973).

[54] Tilton v. Richardson, 403 U.S. 672 (1971).

If the benefit of a liquor-free zone were sufficient to require invalidation of §16C under the Establishment Clause, the more tangible benefits tolerated by this Court would no longer be constitutionally acceptable.

2. That a Legislative classification includes religious institutions but not all other similarly situated institutions does not demonstrate a violation of the Establishment Clause.

In an attempt to buttress its rationale for invalidating §16C, the *en banc* panel devised a new test by which to measure compatibility with the Establishment Clause. Leaving aside whatever benefit §16C might provide, the panel held that §16C was unconstitutional because it distributes that benefit on an "explicitly religious basis." Grendel's II, 662 F. 2d at 107, J.S.A. 15A. The inclusion of schools does not alter the religious nature of §16C because, in the en banc panel's view, §16C does not "encompass all who are otherwise similarly situated to churches in all respects except dedication to 'divine worship'." Grendel's II, 662 F. 2d at 106-107, J.S.A. 22A-23A.[57] This view that any classification which includes religious institutions, but not all other similarly situated institutions, is per se unconstitutional represents a radical and unwarranted addition to Establishment Clause analysis.

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[55] *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

[56] *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961).

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[57] Confessing a lack of any Supreme Court precedent for its view (id.,

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While "the provision of benefits to [a] broad spectrum of groups is an important index of secular effect," Widmar v. Vincent, ___ U.S. ___, 50 U.S.L.W. 4062, 4065 (December 8, 1981), it has never been found to be of controlling significance. See Committee for Public Educa-

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J.S.A. 17A), the First Circuit instead extended its own holding in Rhode Island Federation of Teachers v. Norberg, 630 F. 2d 855, 861 (1st Cir. 1980) ("The pivotal factor in determining the constitutionality of tax devices affecting religious institutions or religious education has been the breadth of the affected class.").

tion v. Nyquist, 413 U.S. at 794.[58/] The size of the benefited class merely provides some clue as to whether an impermissible benefit has been extended to a religious institution. As a practical matter, a statute which benefits only religious institutions is more likely to advance religion than is a statute which benefits religious institutions along with many secular institutions. The exclusively religious definition of a classification would thus indicate that the Court should carefully scrutinize the benefit extended to that class. It is, however, the substantive nature of the benefit, not the breadth of the legislative classification, which

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58/ In Nyquist, the Court recognized that, in the context of school aid, the size of the class of beneficiaries is an important factor for determining the potential political divisiveness of the legislative program. 413 U.S. at 794.

determines whether that benefit advances religion. See Nyquist, 413 U.S. at 794 (monetary reward in the form of a tax benefit and monetary grants for sending children to sectarian schools); Meek v. Pittenger, 421 U.S. 349, 364 (1975) (lending instructional material and equipment directly to qualifying schools).[59]

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[59] The breadth of the legislative classification was examined in Walz v. Tax Commission, 397 U.S. 672-673, 687-689 (1970), as an index of secular purpose. In later cases, reviewing programs which indirectly aid sectarian schools through either tax benefits to parents who send their children to these schools or lending instructional material to the schools, the Court has considered the breadth of the classification to be an index of secular effect. E.g., Wolman v. Walter, 433 U.S. 229, 251 (1977); Sloan v. Lemon, 413 U.S. 825, 830 (1973); Lemon v. Kurtzman, 403 U.S. 602, 610 (1971).

Thus, an Establishment Clause violation does not arise simply because there is a narrow class of beneficiaries which includes religious institutions. Indeed, the decisions of this Court not only permit, but require, explicitly religious classifications under certain circumstances. See Thomas v. Review Board of Indiana Employment Security Division, ___ U.S. ___, 101 S. Ct. 1425 (1981) (denial of unemployment benefits to person who terminated his employment for religious reasons is unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits to Sabbatarian who declined to work on Saturdays is unconstitutional). The tangible benefits provided by these classifications have not been deemed to violate the Establishment Clause. See Thomas, 101 S. Ct. at 1433.

Similarly, religious classifications in land-use planning do not impair Establishment Clause interests.[60] In allocating the available land, land-use planners categorize uses and determine the compatibility of one use with another. In our society, some decision must necessarily be made concerning the placement of religious institutions.[61] Historically, churches have been afforded a distinct and separate category in land-use statutes.[62] They have, moreover, been given preferred status and are presumed a beneficial use.[63]

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[60] Gianella, Religious Liberty, Non-Establishment and Doctrinal Development, Pt. II: The Non-Establishment Principle, 81 Harv. L. Rev. 513, 538-541 (1968) [hereafter Gianella].

[61] Id. at 538.

The *en banc* panel, however, would reverse the traditional treatment of churches in land-use planning. Any zoning benefit extended to churches, but not to all other similarly situated institutions, would be invalidated.[64]

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[62] *Id*. at 546.

[63] *Id*. *See also* Rathkopf, *supra* n. 37, at §20.1; P. Rohan, ZONING AND LAND USE CONTROLS, §3.05[4](b) (1981).

[64] In this case, the *en banc* panel never concluded that the consent mechanism in §16C was in fact unlawful. The panel did not, therefore, question the propriety of the statutory method for allocating land use, but rather simply invalidated the application of that method to churches. By singling out

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Such a rule would preclude governmental bodies from considering the environmental needs of religious institutions in relation to land-use planning. While governmental bodies could use their police power to isolate incompatible nonsectarian uses from one another,[65] they could not use this power to isolate

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(footnote continued)

churches in this manner, the panel effectively requires states to adopt a hostile attitude toward churches in their land-use planning schemes.

[65] For example, a state may use its zoning power to isolate a certain business from residential homes, *see* 8 *McQuillin*, MUNICIPAL CORPORATIONS, §25.129 (3rd ed. rev. 1976), or an adult book store from other "regulated uses," *see* *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), or even one liquor store from another liquor store. *See* *MacKenzie* v. *Town Planning and Zoning Commission of Trumbull*, 149 Conn. 678, 183 A. 2d 619 (1962).

religious institutions from other incompatible uses. For example, the en banc panel's analysis would invalidate any law which prohibited gas stations from operating within the vicinity of a church and school, but failed to extend that protection to all other similarly situated institutions. See Rathkopf, supra n. 37, at §24.02. Moreover, if a state may not prohibit a liquor vendor from conducting his business within the vicinity of a religious institution, it certainly may not prohibit pornographic book stores, nude dancing establishments, or adult movie theatres from the area surrounding churches since each of these activities may claim at least some constitutional protection, a protection not available to the pure commercial interests of a liquor establishment.[66] In an effort to maintain a wall between church and state, the en banc panel has eliminated any buffer between churches and other activities, no matter how offensive they may be.

The Establishment Clause has never required that "[r]eligious institutions . . . be quarantined from the public benefits" of reasonable police power protections such as zoning regulations.[67] Zoning provisions like §16C permit churches to maintain the quality of the environment in which their congregations have developed facilities for the pursuit of their various concerns. Such zoning provisions do not have the primary effect of advancing religion.[68]

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[66] Compare New York Liquor Authority v. Bellanca, ___ U.S. ____, 101 S. Ct. 2599 (1981), with Schaad v. Borough of Mount Ephraim, ___ U.S. ____, 101 S. Ct. 2176 (1981). Under the en banc panel's analysis, a Nevada statute which extends a four-hundred-yard brothel-free zone only to churches and schools would not survive constitutional challenge. NEV. REV. STAT. §201.380 (1967).

[67] Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 746 (1976). Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

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[68] McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., dissenting) ("[G]overnment may take religion into account when necessary to further secular purposes unrelated to the advancement of religion . . . or to create without state involvement an atmosphere in which voluntary religious exercise may flourish."); Gianella, supra n. 60, at 538. Churches depend upon the state for the maintenance of "peace and order essential to the enjoyment of religious freedom and to the discharge of the church's functions." P. Kauper, Church and State: Cooperative Separatism, 60 Mich. L. Rev. 1, 20 (1962). In this regard, §16C accommodates the Free Exercise Clause interests of the citizens of Massachusetts. The resulting benefit to religion "manifests no more than the tension between the two

(footnote continued)

The inclusion of schools, both public and private, evidences the nonsectarian characteristics of §16C and refutes the _en banc_ panel's conclusion that §16C distributes its benefits on an explicitly religious basis. That other institutions or land uses could have been, but were not, included within this classification does not impair its validity since "every line drawn by a legislature leaves some out that might well have been included." _Village of Belle Terre_ v. _Boraas_, 416 U.S. 1, 8 (1974). This type of line-drawing is a legislative rather than a judicial function. _Id_. _See supra_, pp. 40-45.

(footnote continued)

clauses," and does not violate the Establishment Clause. _Thomas_ v. _Board of the Indiana Employment Security Division_, ___ U.S. ___, 101 S. Ct. 1425, 1433 (1981).

In any event, the _en banc_ panel's analysis exceeded the proper role of judicial review. The record in this case does not provide a sound evidentiary basis for determining which, if any, other institutions are similarly situated in all relevant respects. The parties best equipped to present such evidence, _i.e._, those institutions which might claim to be similarly situated, are not before the Court. The only party before the Court, Grendel's, lacks standing to prosecute whatever rights those similarly situated institutions might have. _See_ _McGowan_ v. _Maryland_, 366 U.S. 420, 429 (1961).[69]

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[69] _See generally_ _Valley Forge Christian College_ v. _Americans United for_

(footnote continued)

In sum, §16C provides a liquor-free zone to those institutions whose activities the Legislature has determined to

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Separation of Church and State, 50 U.S.L.W. 4103, 4105, 4109 (January 12, 1982); Singleton v. Wulff, 428 U.S. 106, 113-114 (1976); and Warth v. Seldin, 422 U.S. 490, 499-502 (1975).

The en banc panel erroneously relied upon Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980), to support its conclusion that Grendel's "has standing to mount" an attack on the underinclusiveness of the statute. Grendel's II, 662 F. 2d at 107 n. 11; J.S.A. 23A, n. 11. Village of Schaumberg involved freedom of speech where the Court has traditionally discarded the "normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." Id. at 634. This overbreadth doctrine has never been applied in the Establishment Clause context. See Valley Forge Christian College, 50 U.S.L.W. at 4106, 4109-4110; McGowan v. Maryland, 366 U.S. 420, 429 (1961).

be most incompatible with liquor distribution and consumption. The benefit of such a zone does not have the primary effect of advancing religion and does not impair any interest protected by the Establishment Clause.

C. Section 16C Does Not Foster Excessive Government Entanglement With Religion.

The en banc panel did not reach the final requirement under the Establishment Clause that a statute "not foster an excessive government entanglement with religion." Wolman v. Walter, 433 U.S. 229 (1977).[70/] The Court has addressed the question of excessive entanglement only where a governmental body is extending monetary aid to a religious institution. See Committee for Public

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[70/] See Grendel's II, 662 F.2d at 107 n. 11, J.S.A. 24A, n. 11.

Education v. Nyquist, 413 U.S. 756, 772-773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 619-620 (1971).[71] The requirement ensures that monetary aid given to religious institutions will not be used for religious purposes, see Lemon, supra at 619, and will not lead to political disputes over subsequent appropriations. Lemon, supra at 624. Section 16C does not, however, provide any monetary or material aid to churches. For this reason, the question of excessive entanglement does not arise in this case. In order to eliminate any uncertainty, however, the Commission will demonstrate that §16C cannot be said to produce excessive entanglement.

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[71] See also Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 370-372 (1975).

This inquiry entails consideration of four factors: (1) the character and purpose of the benefited institution; (2) the nature of the aid provided; (3) the resulting relationship between the state and the religious authority; and (4) the divisive political potential of the state program. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 749 (1976); Lemon v. Kurtzman, 403 U.S. 602, 615, 622-24 (1971). As the very concept of excessive entanglement implies, these factors are to be considered cumulatively. No single factor is necessarily controlling. Roemer, 426 U.S. at 766; Tilton v. Richardson, 403 U.S. 672, 688 (1971). In contrast with the substantive nature of the test as to a given statute's primary effect, "entanglement is essentially a procedural problem . . . ." Roemer, 426 U.S. at 755 (1976). It concerns the form of the interaction between church and state.

As to the character and purpose of the churches encompassed by §16C, variety is their essential trait. Besides serving as houses of worship, churches, like schools, provide facilities for community members "to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music." Walz v. Tax Commission, 397 U.S. 664, 688 (1970) (Brennan, J., concurring). Thus, churches constitute centers for educational, cultural and recreational activity as well as for spiritual enrichment. This last factor is, of course, itself a civic good.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

With respect to the nature of the aid provided by §16C, its "non-ideological character" satisfies the Establishment Clause. Tilton v. Richardson, 403 U.S. 672, 687 (1971). This statutory protection does not promote any particular activity of a religious organization and does not "confer any imprimatur of State approval on religious sects or practices." Widmar v. Vincent, 50 U.S.L.W. at 4065. See Walz, 397 U.S. at 689 (Brennan, J., concurring).

The relationship that §16C creates between churches and governmental authorities is limited to the church's written objection to a license application. Such a "one-time, single-purpose" relationship does not produce entanglement. See Tilton v. Richardson, 403 U.S. at 688. Cf. Committee for Public Education v. Regan, 444 U.S. 646 (1980). Rather, it reduces the need for interaction between a church and governmental authorities. Were the self-operating procedure established by §16C unavailable, the local licensing authorities would have to weigh the proximity of churches in an ad hoc manner when considering applications for liquor licenses. Church officials would be entitled to present their views at an administrative hearing. Local authorities would then have to evaluate the significance of the church's concerns. Such a governmental inquiry into the affairs of a religious organization could potentially create greater entanglement and divisiveness than exists under §16C.[72]

Section 16C does not increase the likelihood of political divisiveness, but rather reduces any such friction. The Court has recognized that:

> The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the extension, rather than the withholding, of certain benefits to religious organizations.[73]

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[72] While local licensing boards may now consider the proximity of the premises to be licensed to a church even if the church fails to object or is more than five-hundred feet away, §16C avoids such entanglement when a church within five-hundred feet does object.

[73] Roemer, 426 U.S. at 749 n. 15 (1976). One rationale for upholding the property tax exemption in Walz v. Tax

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By avoiding any administrative assessment of a church's concerns, §16C precludes any potential disagreement on this subject.[74] In short, §16C minimizes the potential entanglement of churches with state and local authorities. Therefore, it does not violate the Establishment Clause on this ground.

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Commission was that:

> Elimination of the exemption would expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the indirect confrontations and conflicts that follow in the train of those legal processes.

397 U.S. at 674.

[74] This appeal involves only a facial challenge to §16C. The Commission has maintained from the inception of this case that it could reject or ignore any objection under §16C which was made for discriminatory or otherwise illegal reasons. See Grendel's I, 662 F. 2d at 98 n. 10, J.S.A. 80A-81A.

In conclusion, §16C passes each element of the Court's three-part test. Without creating an excessive entanglement between church and state, §16C insulates cultural, educational, and religious centers from the disturbances associated with liquor consumption. The benefit it bestows upon these institutions does not impair any Establishment Clause interest and thus §16C does not violate the First Amendment's proscription against the establishment of religion.

III. DUE PROCESS PRINCIPLES DO NOT PROVIDE INDEPENDENT SUPPORT FOR THE JUDGMENT OF THE EN BANC PANEL.

A. Grendel's Due Process Claim is Not Before the Court.

The en banc panel's holding rests exclusively on Establishment Clause principles. It specifically declined to address the Due Process claim advanced by Grendel's. Grendel's II, 662 F. 2d at 104 and 107 n. 11, J.S.A. 9A and 24A n. 11. This claim is, therefore, not an issue in this appeal.[75] In any event,

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[75] The last panel to consider this issue upheld the constitutionality of §16C. Grendel's I, 662 F. 2d at 90-95, J.S.A. 37A-64A. The en banc panel did not reach this issue. This appeal does not, therefore, bring the due process issue before the Court. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 163-164 (1975); see

(footnote continued)

Grendel's Due Process claim is meritless.

Grendel's asserts that §16C violates the Due Process Clause because it delegates legislative authority to churches and schools. The District Court agreed with Grendel's argument and held §16C invalid on that ground. Grendel's Den, Inc., 495 F. Supp. at 764-766, J.S.A. 111A-122A.[76] The

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Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 271 (1977). Nevertheless, in its motion to affirm, Grendel's advances its Due Process claim as an independent ground for affirming the judgment of the en banc panel. M.T.A., 9-11. Without waiving its position on the scope of this appeal, the Commission will rebut Grendel's argument.

[76] The District Court found both the original version of §16C (the ban) and the 1968 version of §16C (written consent) constitutional. Grendel's Den, 495 F. Supp. at 764-765, J.S.A. 114A-115A. Under this view, the Massachusetts Legislature could cure any infirmity in §16C by a more restrictive approach toward license applicants.

original panel of the First Circuit rejected Grendel's argument. In reliance on the Supreme Judicial Court's decision in Arno, the original panel held that §16C did not delegate legislative authority to churches or schools.[77]

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[77] Under state law, Grendel's has no protected interest in the transfer of a liquor license to it. Massachusetts law specifically withholds from the liquor license the character of a property interest. Mass. Gen. Laws c. 138, §23 (West 1974), S.A. 5a. See also Opinion of the Justices, 368 Mass. 857, 862-865, 333 N.E. 2d 414, 418-419 (1975), and cases cited; Opinion of the Justices, 349 Mass. 794, 797-798, 208 N.E. 2d 823, 826 (1965). As a license applicant, Grendel's rights are less than those of a licensee. See Shamie v. City of Pontiac, 620 F. 2d 118, 120-121 (6th Cir. 1980). Cf. Barry v. Barchi, 443 U.S. 55, 64 (1979). Consequently, Grendel's does not have at stake a recognized property interest which would warrant due process protection. Grendel's I, 662 F. 2d at 90 n. 1.

B. The Principle Established in Cusack v. City of Chicago, 242 U.S. 526 (1917), Refutes Grendel's Due Process Claim.

Section §16C does not delegate legislative authority to churches or schools; it merely allows pre-existing churches and schools to waive a legislative restriction on the sale of alcoholic beverages. See Grendel's I, 662 F. 2d at 93-94, J.S.A. 55A-56A; Arno, 384 N.E. 2d at 1227-1228, J.S.A. 178A. In an effort to accommodate the distribution of liquor with the activities of pre-existing religious institutions, the Legislature has selected the expressed interest of schools and churches as the most practical mechanism by which to judge the propriety of licensing additional premises for the distribution of liquor near these institutions. Arno, 384 N.E. 2d at 1228, J.S.A. 178A; Grendel's I, 662 F. 2d at 95, J.S.A. 61A-62A. Churches and schools enjoy no legislative or policymaking authority. Their participation in the process is tightly confined to silence, assent or objection. Only their objection has a guaranteed effect.[78] That objection is not the imposition of a private policy, but the implementation of a public policy enacted and supervised by the elected Legislature. The fact that a private party may forgo an otherwise valid legislative protection does not make a statute invalid. New Motor Vehicle Board of California v. Orrin W. Fox,

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[78] If the protected institution does not file an objection, the applicant may still be denied his license by the local authorities or the Commission. Arno, 384 N.E. 2d at 1227 n. 10, J.S.A. 173A, n. 10.

439 U.S. 96, 109 (1978); Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 698 n. 12 (1976). In this regard, §16C operates like the ordinance in Cusack v. City of Chicago, 242 U.S. 526 (1917), the leading case on point.

In Cusack, a Chicago ordinance conditioned the construction of billboards in residential neighborhoods upon the consent of a majority of the owners of frontage property on the block in which the billboard was to be erected. An applicant seeking a permit to erect a billboard challenged the ordinance as a delegation of governmental power to private persons. The Court first observed that the regulation and control over the construction and maintenance of billboards was a legitimate exercise of the city's police power. Cusack, 242 U.S. at 529-530. The Court then rejected the delegation claim as "palpably frivolous" observing that the consent provision relaxed an otherwise absolute ban and that:

> [R]eference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exercise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons . . . and as to the location of garages . . . . Such treatment is plainly applicable to offensive structures."

Id. at 530 [emphasis added]. The holding in Cusack disposes of Grendel's Due Process claim.

Like the ordinance in Cusack, §16C allows churches and schools to modify a valid legislative restriction on a use which is properly the subject of regulation -- the distribution of alcohol. While the Legislature has modified the procedure by which consent is obtained, it retained "the essential legislative mandate that no license be granted within the protected area in the face of a nonconsenting church or school." Arno, 384 N.E. 2d at 1228, J.S.A. 178A; Grendel's I, 662 F. 2d at 93-94, J.S.A. 54A-56A.

Grendel's has previously contended that §16C operates more like the ordinances invalidated in Eubank v. City of Richmond, 226 U.S. 137 (1912), and Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). M.T.A. 10. However, the holding in each of these cases may be distinguished on the equities inherent in their underlying facts.

In Eubank, a Virginia statute authorized municipalities to enact building regulations, including the establishment of building lines. Pursuant to this authority, Richmond's city council passed an ordinance which empowered the owners of two-thirds of the property abutting on any street to establish, within a range of five to thirty feet, a set-back line for buildings on that street. The Court found that the ordinance authorized private persons to impose upon other landowners a restriction which lacked a general legislative purpose and design.[79/] Thus, the Court found the ordinance to be an unreasonable exercise of the police power since "[i]t [was] hard to understand how the public comfort or convenience, much less the public health, can be promoted by a line which may be so variously disposed." Id. at 144.

In Roberge, the trustee of a philanthropic home sought to replace an existing structure with a new and enlarged structure. While Seattle's comprehensive zoning scheme authorized the proposed building, that scheme had been amended so as to condition approval upon the

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[79/] As a set-back line would be established only upon the request of the landowners, the ordinance allowed them to determine whether there would even be a set-back line on a given street. Eubank, 226 U.S. at 143.

consent of the owners of two-thirds of the property within four-hundred feet of the proposed building. The Court invalidated the amendment on the grounds that the "Legislature could not under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of property or the pursuit of useful activities." Id. at 121. It found the ordinance to be unreasonable since it restricted a proposed use which "was in harmony with the public interest and with the general scope and plan of the zoning ordinance." Id.[80]

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[80] The Court distinguished Cusack on the ground that in Cusack the facts found were sufficient to warrant the conclusion that billboards "would or were liable to endanger the safety and decency" of the community. Id. at 122.

In both Eubank and Roberge, the Court invalidated the ordinances because the ordinances did not implement any official determination of the public interest in the regulation of land use, but rather authorized neighboring landowners to exercise their own discretion in the matter.[81] In contrast, the Cusack ordinance placed a restriction upon a proposed use which could be potentially deleterious to the community. Thus, the ordinance in Cusack was found to be "in the interest of safety, morality, health and

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81/ For cases distinguishing Eubank and Roberge on these grounds, see Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974); Currin v. Wallace, 306 U.S. 1, 15-16 (1939). See also L'Enfant Plaza Properties, Inc. v. District of Columbia Redevelopment Land Agency, 564 F. 2d 515, 518-519 (D.C. Cir. 1977); Southern Alameda Spanish Speaking Organization v. City of Union, 424 F. 2d 291, 294 (9th Cir. 1970).

decency of the community." Cusack, 242 U.S. at 529-30.

Here, the authority to regulate the proposed use is well within the police power of the Massachusetts Legislature. Moreover, like the billboards restricted in Cusack, liquor distribution has been traditionally viewed as an offensive use with the potential to interfere with other land uses. See Cusack, supra at 530; Mugler v. Kansas, 123 U.S. 623 (1887). Thus, like the city officials in Cusack, the Massachusetts Legislature has through its police power regulated a potentially offensive use by permitting those most affected to modify an otherwise total prohibition.[82]

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[82] State courts which have confronted similar delegation claims in regulations

(footnote continued)

Judge Campbell, writing for the majority in Grendel's I, identified the general principle to be gleaned from the three cases:

> [L]egislative bodies may not abrogate their responsibility to formulate and impose policy regarding matters such as zoning or the issuance of governmental privileges, by

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(footnote continued)

concerning liquor sales have uniformly upheld the government's action. See 45 Am. Jur. 2d Intoxicating Liquors §156 (1969). See also Davis v. Blount County Beer Board, 621 S.W. 2d 149, 151-152 (Tenn. 1981) (upholding an ordinance which prohibits liquor licenses within three-hundred feet of a residential dwelling if the owner of the residence objects); Beacon Liquors v. Martin, 279 Ky. 460, 131 S.W. 2d 446, 450 (1939) (upholding a statute which prohibited the issuance of a liquor license within two-hundred feet of a non-consenting church, school or hospital). Courts have generally upheld even those consent requirements which wholly lack standards or guidelines when the proposed use is offensive to the community. See Rathkoff, supra n. 37 at §29.05, p. 29-8. See also L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 227 (1937).

> delegating this responsibility to private parties "uncontrolled by any standard or rule prescribed by legislative action . . . " Roberge, supra, 278 U.S. at 122, 49 S. Ct. at 52. When, however, a legislative body has decided, in valid exercise of its powers, that it is necessary to restrict a use manifestly subject to regulation, the problem of an abdication of legislative responsibility lessens and it may then be appropriate to condition the imposition of such restrictions upon lack of consent to the potentially offending use by the parties that the regulation seeks to protect.

Grendel's I, 662 F. 2d at 92-93, J.S.A. 49A-51A.[83]

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[83] Section 16C may also be distinguished from the ordinances in Eubank and Roberge on the basis of the property interest involved. In both Eubank and Roberge, the property affected had been acquired without any pre-existing restriction on its use or its disposition. Thus, the restriction was authorized after complete and unrestricted ownership had vested in the person affected. Old Dearborn Co. v. Seagram Corp., 299 U.S. 183, 194 (1936). In this case, the restriction has existed in one form or another since 1954. The restriction thus antedates the application by Scorpio's, Inc. for approval of the transfer of its liquor license to Grendel's.

C. The Massachusetts Legislature Has Not Retreated to a Neutral Policy Concerning the Proximity of Liquor Establishments to Churches.

Grendel's argued below, and the District Court agreed, that the Massachusetts Legislature abrogated its responsibility in 1970 when it amended §16C to its present form. By that amendment, the Legislature is said to have removed its general prohibition and adopted a neutral policy concerning the proximity of liquor establishments near schools and churches. See Grendel's Den, Inc., 495 F. Supp. at 765-766, J.S.A. 114A-115A, 120A. However, a review of the legislative progression culminating in the present version of §16C refutes this claim. See Arno, 384 N.E. 2d at 1226-1227; J.S.A. 172A-178A; Grendel's I, 662 F. 2d at 93-94, J.S.A. 52A-56A. See supra, pp. 37-38.

The progressive liberalization from an absolute ban to the present version does not reflect any shift in the underlying legislative judgment. Arno, 384 N.E. 2d at 1228, J.S.A. 178A. The Legislature merely altered the mechanism by which consent is acquired in order to make its restriction less burdensome to liquor license applicants.[84/] In doing

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[84/] That the Legislature did not change its underlying judgment is evidenced by the changes in the notice provisions (Mass. Gen. Laws c. 138, §15A) which accompanied the 1970 amendment to §16C.

Prior to 1970, a license applicant was merely required to publish a general notice of his pending license application in a local newspaper. 1968 Mass. Acts c. 361. Along with its 1970 amendment to §16C, the Legislature included an amendment to the notice provision by inserting the requirement that:

> "The notice sent to such church or school shall indicate the necessity of a written objection to prevent the issuance of or transfer of such license under the provisions of section sixteen C."

(footnote continued)

so, however, it retained the general prohibition. Unlike the restrictions authorized by the ordinances in Eubank and Roberge, the restriction embodied in §16C was framed by the Legislature and reflects a clear statement of legislative policy. Grendel's I, 662 F. 2d at 93, J.S.A. 52A. Like the ordinance in Cusack, it does not delegate legislative authority and does not violate the Due Process Clause.

(footnote continued)

1970 Mass. Acts c. 192, §2, S.A. 9a.

Thus, the Legislature realized that it was shifting the burden from the license applicant to the churches and schools, and therefore, granted the churches and schools the added protection of an expanded notice.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the First Circuit insofar as it holds that Massachusetts General Laws c. 138, §16C, violates the Establishment Clause.

Respectfully submitted,

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STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS

Constitution of the United States

AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

AMENDMENT XXI:

Section 2. The transportion or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

STATUTORY PROVISION INVOLVED

The validity of Massachusetts General Laws c. 138, §16C, is at issue. That provision provides in full as follows:

> Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto; but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.
>
> In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age.

> This section shall not apply to an extension of licensed premises provided said extension does not exceed fifty feet.

The text of the statute is presently located at page 185 of volume 20, Massachusetts General Laws Annotated (West Publishing Company, 1974).

OTHER MASSACHUSETTS STATUTES

MASSACHUSETTS GENERAL LAWS C. 138, §15A:

. . . Every applicant for an original license under section twelve, fifteen or thirty A, or for a transfer of such a license from one location to another, or an applicant for a change in the description of a licensed premises, or someone in his behalf, shall, within three days after publication as hereinbefore provided, cause a copy of the published notice to be sent by registered mail to each of the persons appearing upon the assessors' most recent valuation list as the owners of the property abutting on the premises where the license is intended to be exercised and, if a school, which gives not less than the minimum instruction and training to children of compulsory school age required by chapter seventy-one, or a church or hospital, is located within a radius of five hundred feet from said premises, to such school, church or hospital. The notice sent to such school, church or hospital shall indicate the necessity of a written objection to prevent the issuance or transfer of such license under the provisions of section sixteen C.

MASSACHUSETTS GENERAL LAWS, C. 138, §23:

. . . The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made.

No holder of such a license or permit hereunder shall have any property right in any document or paper evidencing the granting of such license or permit and issued by the licensing authorities, and said authorities, upon the expiration, suspension, revocation, cancellation or forfeiture of such a license or permit shall be entitled upon demand to the immediate possession thereof. The superior court shall have jurisdiction in equity, on petition of the licensing authorities, to enforce this provision . . .

1954 MASS. ACTS c. 569, §1:

AN ACT LIMITING LICENSES FOR THE SALE OF ALCOHOLIC BEVERAGES NEAR SCHOOLS AND CHURCHES.

Be it enacted, etc., as follows:

Section 1. Chapter 138 of the General Laws is hereby amended by inserting after section 16B the following section:

Section 16C. Premises, except those of an innholder, located within five hundred feet, measured along public ways, of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from premises located within the said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location.

In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age.

Section 2. The provisions of section sixteen C of chapter one hundred and thirty-eight of the General Laws, inserted by section one of this act, shall not apply to premises which, prior to the effective date of this act, or prior to the establishment of a church or school within five hundred feet thereof, were licensed for the sale of alcoholic beverages.

Section 3. This act shall take effect on January first, nineteen hundred and fifty-six.

1968 MASS. ACTS c. 435

AN ACT RELATIVE TO THE ISSUANCE OF LICENSES FOR THE SALE OF ALCOHOLIC BEVERAGES.

Be it enacted, etc., as follows:

Section 16C of chapter 138 of the General Laws is hereby amended by striking out the first paragraph, as amended by section 1 of chapter 629 of the acts of 1965, and inserting in place thereof the following paragraph:-

Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from said premises located within the said distance to other premises located therein, if it is transferred to a location, not less remote from the nearest church or school than its former location, nor shall it apply to the licensing of premises located within a radius of five hundred feet of a church if the governing body of such church assents in writing to such licensing.

1970 MASS ACTS c. 192

Section 1. Section 16C of chapter 138 of the General Laws is hereby amended by striking out the first paragraph, as most recently amended by chapter 305 of the acts of 1969, and inserting in place thereof the following paragraph:

Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto; but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.

Section 2. The second paragraph of section 15A of said chapter 138, as appearing in section 5 of chapter 542 of the acts of 1943, is hereby amended by inserting after the first sentence the following sentence: The notice sent to such church or school shall indicate the necessity of a written objection to prevent the issuance or transfer of such license under the provisions of section sixteen C.

Appellant's Brief

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No. 81-878.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

JOHN P. LARKIN, ET AL., AND
CAMBRIDGE LICENSE COMMISSION,
APPELLANTS,

v.

GRENDEL'S DEN, INC.,
APPELLEE.

ON APPEAL FROM AN EN BANC JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief for Cambridge License Commission.

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Question Presented.

Whether a state may, within the limits imposed by the Establishment Clause of the First Amendment, accommodate the diverse interests of its citizens through a zoning statute which shields objecting schools and churches from the disturbances associated with the distribution and consumption of liquor within their immediate vicinity.

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No. 81-878.

In the
Supreme Court of the United States.

October Term, 1981.

JOHN P. LARKIN, et al., and
CAMBRIDGE LICENSE COMMISSION,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief for Cambridge License Commission.

Opinions Below.

The United States Court of Appeals for the First Circuit has rendered two opinions in this case: the decision of the original panel (Appendix to Appellants' Jurisdictional Statement

[J.S.A.], 31A-99A), *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 88 (C.A. 1, 1981) (*Grendel's I*), and the decision of the First Circuit sitting *en banc* (J.S.A. 1A-30A), *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 102 (C.A. 1, 1981) (*Grendel's II*).

The opinion of the district court is reported in *Grendel's Den, Inc.* v. *Goodwin, et al.*, 495 F. Supp. 761 (D. Mass. 1980), and reprinted in J.S.A. 101A-143A.

Jurisdiction of This Court.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2).

Constitutional Provisions and Statute Involved.

CONSTITUTION OF THE UNITED STATES.

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Twenty-first Amendment.

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

STATUTORY PROVISION.

Massachusetts General Laws, c. 138, § 16C.

Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto; but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.

In this section a church shall mean a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses, and a school shall mean an elementary or secondary school, public or private, giving not less than the minimum instruction and training required by chapter seventy-one to children of compulsory school age. This section shall not apply to an extension of licensed premises provided said extension does not exceed fifty feet.

Statement of the Case.

The parties stipulated to the facts in this case (J.A. 48-52). On May 13, 1977, Scorpio's Inc., a holder of an all alcoholic beverages restaurant license, applied to the Cambridge License Commission (CLC) for approval of the transfer of its license to Grendel's (J.A. 50). Notice of the transfer application was duly published in a local newspaper (J.A. 50). Also, in accordance with Mass. G.L. c. 138, § 15A, notice was given to all abutting property owners, and to all schools, hospitals, and churches within a radius of 500 feet from Grendel's (J.A. 50). In response to this notice, the Holy Cross Armenian Catholic Church sent a letter of opposition to the City (J.A. 51).

Pursuant to Mass. G.L. c. 138, § 16C, the CLC denied the transfer (J.A. 51). Following this denial, both Grendel's and Scorpio's appealed to the Alcoholic Beverages Control Commission (Commission) (J.A. 52). The Commission held a hearing on September 8, 1977, following which it sustained the denial of the transfer (J.A. 52).

Grendel's filed its complaint in district court on November 7, 1977 (J.A. 1). Grendel's challenged the constitutionality of section 16C on the grounds, among others, that the statute: (1) improperly delegated legislative authority in violation of the

Due Process and Equal Protection Clauses; and (2) violated the Establishment Clause by granting churches a legislative veto over liquor licenses (J.A. 18).

In response to the complaint, the Commission and the CLC filed motions to dismiss (J.A. 2, 26, 40). Subsequently, the parties agreed to continue the case pending the Massachusetts Supreme Judicial Court's decision in *Arno* v. *Alcoholic Beverages Control Commission*, 377 Mass. 83, 384 N.E.2d 1223 (1979), which involved similar issues. Following the *Arno* decision, which upheld the constitutionality of section 16C, the district court, after a hearing, denied the motions to dismiss (J.A. 2).

On the basis of the stipulated facts, all parties thereafter moved for partial summary judgment (J.A. 2, 3). On August 14, 1980, the district court issued its opinion and entered an order granting Grendel's motion (J.A. 3, 4). The district court held that section 16C violated both the First Amendment and the Due Process Clause of the Fourteenth Amendment (J.S.A. 143A). The court rejected the Commission's Twenty-first Amendment argument (J.S.A. 118A-120A).

The Commission and the CLC appealed from the district court's action (J.A. 5), and, on April 7, 1981, the First Circuit Court of Appeals, in a split decision, reversed. *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 88 (C.A. 1, 1981) (*Grendel's I*). The court held that section 16C did not violate the Due Process Clause since it was "a reasonable means of regulation in an area where states have wide latitude to regulate, and [is] not dissimilar to schemes commonly used in the fields of licensing and zoning." *Id.* at 95. The court also held that the statute did not run afoul of the Establishment Clause since "it does not have a 'primary effect of advancing religion' as that phrase has been used in Supreme Court precedent." *Id.* at 96.

Following the First Circuit's decision, Grendel's petition for rehearing *en banc* was granted (J.S.A. 149A; J.A. 7). On

July 28, 1981, the *en banc* panel, in a split decision, held section 16C to be unconstitutional. *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 102 (C.A. 1, 1981) (*Grendel's II*). Without discussing whether the statute vested any legislative power in religious institutions, the majority of the *en banc* panel held that the statute provided a benefit to churches which had more than a remote or incidental effect in advancing religion. *Id.* at 104-105. The majority also held that the statute "distributes its benefits on an *explicitly religious basis*" (emphasis in original). *Id.* at 105. On these grounds, the majority concluded that "section 16C has a 'primary' or 'principal' effect of advancing religion." *Id.* at 107. Finally, the majority's sole discussion of the Twenty-first Amendment was its comment in a footnote that "the Twenty-first Amendment does nothing to alter our decision in this case." *Id.*, n.11.

The Commission filed its notice of appeal to the Supreme Court of the United States on August 11, 1981, and the CLC filed its notice of appeal on August 12, 1981 (J.A. 7).

The Commission and the CLC filed a joint jurisdictional statement on November 12, 1981.

This Court noted probable jurisdiction on January 11, 1982 (J.A. 8).

Summary of Argument.

I. THE HISTORY OF THE ESTABLISHMENT CLAUSE AND THE PHILOSOPHIES OF THE FRAMERS INDICATE THAT MASS. G.L. c. 138, § 16C, DOES NOT INJURE ANY INTEREST PROTECTED BY THAT CLAUSE.

In light of the Court's observation that the purpose of the Religion Clauses "was to state an objective, not to write a statute," *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970), this argument examines the history of the Establishment Clause as an aid to clarifying the objective of the Founding Fathers — the evils which they sought to guard against and the values they sought to preserve.

A. *Religion in the Colonies.*

This section summarizes the history of Church and State in the colonies, relying on *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and other sources. It notes that, at the outbreak of the Revolution, there were established churches in most of the colonies. Roger Williams' belief that there should be a "wall of separation between the garden of the church and the wilderness of the world" is summarized. (See pp. 14-16, *infra*.)

B. *The State Constitutions.*

This section presents a summary by Cobb in 1902 of the religious provisions of State Constitutions, as follows:

> The points on which all the state constitutions are at one are as follows: —
>
> 1. No legislature can pass a law establishing religion, or a Church. To effect such purpose a change in the constitution would be required.
> 2. No person can be compelled by law to attend any form of religious service; or, —
> 3. To contribute to the support of any such service or Church.
> 4. No restraint can be put by law on the free exercise of religion; or, —

5. On the free expression and promulgation of religious belief. *Provided* always, that this freedom "shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State."

Cobb, *The Rise of Religious Liberty in America* 520 (1902). (*See* p. 17, *infra.*)

C. *Virginia.*

This section traces the struggle for religious liberty in Virginia between 1776 and 1786, with particular attention to the Virginia Bill of Rights (1776), the disestablishment of the Church of England, Madison's *Memorial and Remonstrance against Religious Assessments* (1785), and Jefferson's *Bill for Religious Liberty* (1786). (*See* pp. 17-22, *infra.*)

D. *The Adoption of the First Amendment.*

This section begins by noting that in 1787 there were many different attitudes regarding the proper relation between Church and State in the different states. It traces the debates in the First Congress in 1789 on the adoption of the First Amendment, showing the difference between the Religion Clauses as originally proposed by Madison and as finally adopted. The different views of Madison and other representatives regarding "establishment" also emerge. (*See* pp. 22-25, *infra.*)

E. *The Lessons of History.*

Although we recognize that the historical purposes of the Religion Clauses are complex, we attempt to draw some conclusions.

1. Establishment Clause Intended to Restrain Only Federal Government.

This section points out that the Establishment Clause was intended to prohibit the establishment of religion only by the federal government, and that it was probably intended to prevent that government from interfering with establishments by the states. (*See* p. 26, *infra*.)

2. The Meaning of Nonestablishment.

Here, we argue that the core concept of the Establishment Clause, as it was understood by the founding fathers, was that the government "could not establish a state religion or afford privileges to any religious group or impose disabilities on any individual on the basis of religious preference or affiliation." Kurland, *The Irrelevance of the Constitution*: *The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILLANOVA L. REV. 3, 9 (1979) (footnote omitted). This concept reflected a central purpose of both Religion Clauses, *i.e.*, the protection of religious liberty. We further argue that the "practice perceived by the Framers as perhaps the most serious infringement of religious liberty sought to be corrected by the Establishment Clause was forcing the people to support religion by the use of compulsory taxes for purely sectarian purposes." Choper, *The Religion Clauses of the First Amendment*: *Reconciling the Conflict*, 41 U. OF PITT. L. REV. 673, 677 (1980) (footnote omitted). (*See* pp. 26-28, *infra*.)

3. Application to This Case.

Here, we argue that Mass. G.L. c. 138, § 16C, does not violate the core concept of the Establishment Clause, because "establishment," for the framers, "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). We recognize that this type of zoning statute was probably unknown in 1790, and that many modern cases raise problems unknown to the authors of the First Amendment. To decide these cases, the Court must be guided by a philosophy regarding the proper place of religion in American society. (*See* pp. 28-29, *infra*.)

Although Justices Black and Rutledge felt that the Religion Clauses were principally shaped by the ideas of Jefferson and Madison, this conclusion is debatable. In the end, these clauses were written by a committee, not by Madison alone. The phrase "separation of Church and State" does not appear until 1802. Even if the Establishment Clause was based entirely on the thinking of Jefferson and Madison, we argue that they would have favored section 16C, because they, in common with most of the other framers, believed that Christianity should receive encouragement from the State, so far as was compatible with freedom of worship. Here, we also take note of Professor Howe's thesis that the Religion Clauses owe more to Roger Williams' philosophy than to Jefferson's. We argue that section 16C is compatible with Williams' philosophy and also that expressed in *Walz*. (*See* pp. 29-31, *infra*.)

Regarding modern problems unknown to the framers, we argue, quoting Professor Gianella, that religious groups must be allowed to share in "benefits flowing from governmental structuring of the social order. . .." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (Part II, "The Nonestablishment Principle"), 81 HARVARD L. REV. 513, 515 (1968). Regarding zoning laws, we agree with Gianella that

> in planning a total environment the zoning authorities are compelled to determine the relative value to be accorded religious uses in their calculus, and the establishment clause cannot be read to require religion to take a position of lowest priority.

Id. at 541. Professor Gianella's approach charts the wisest course between the two Religion Clauses. When Mr. Justice Douglas observed that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), his words reflected a philosophy which should guide all interpretations of the Establishment Clause. This philosophy guided the framers, and should guide the Court today. (*See* pp. 31-33, *infra*.)

II. The History of Alcoholic Beverage Regulation and Zoning Law Indicates that Mass. G.L. c. 138, § 16C, does Not Injure Any Interest Protected by the Establishment Clause.

The history of the regulation of alcoholic beverages and the protection of churches and similar institutions indicate that the rights protected by Mass. G.L. c. 138, § 16C, and by the Twenty-first Amendment are substantial.

Since the legitimacy of the restrictions imposed by section 16C must be examined with reference to all of the surrounding circumstances, this argument examines the history of the regulation of alcoholic beverages, the history of the protection of churches, schools, and similar land uses, and the development of the law of zoning. (*See* pp. 33-40, *infra*.)

A. *Historically, Commerce in Alcoholic Beverages has been Strictly Regulated.*

This section presents a summary of the laws of the Province of Massachusetts Bay relating to the regulation of alcoholic beverages. The session laws of the Province dealt with the regulation of sales and the licensing of sellers, taxation of wine, restrictions on the sale of alcoholic beverages on the "Lord's

Day," and restrictions on places where spirits could be manufactured. Restrictions on the use of alcoholic beverages in Sunday closing laws are also examined. (*See* pp. 33-34, *infra*.)

B. *Churches and Schools are Part of a Class of Land Uses Traditionally Protected.*

This section describes the history of the protection of churches and schools. There has been statutory and common law protection of churches or cemeteries from desecration. As zoning law was developing, churches and schools were granted zones of protection from gasoline filling stations. The majority of the states have enacted statutes providing some alcohol-free zone of protection around churches, schools, and similar uses. (*See* pp. 34-36, *infra*.)

C. *Zoning has Developed as a Means of Controlling Land Use and the Quality of Life.*

This section initially deals with some aspects of the development of zoning law and the purpose of zoning law as set forth in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The *Euclid* standards for judicial review are re-examined and reiterated in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, *reh. denied*, 429 U.S. 873 (1976), which deals with a conflict between a zoning law and First Amendment free expression rights. A concurring opinion in *Young* stated that "the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions . . . ." *Id.* at 74. (*See* pp. 36-38, *infra*.)

D. *The Benefit Conferred on the Church Here is Incidental to the Main Purpose of the Statute: the Creation of a Zone of Protection for Schools and Churches and the Regulation of Alcoholic Beverages Pursuant to the Twenty-first Amendment and the Police Power.*

This section sets forth the Twenty-first Amendment rights of states and the "broad powers to regulate" recently reiterated by this Court in *New York State Liquor Authority* v. *Bellanca*, U.S. , 101 S.Ct. 2599, 69 L. Ed. 2d 357 (1981), and argues that the benefit conferred on the Church here is incidental to the main purpose of Mass. G.L. c. 138, § 16C: the creation of a zone of protection for schools and churches pursuant to the police power and the Twenty-first Amendment.

In conclusion, we argue that in light of the history of the Establishment Clause, the history of the regulation of alcoholic beverages, and the history of the zoning protection afforded to churches, section 16C cannot be viewed as an "establishment of religion." (*See* pp. 38-40, *infra*.)

Argument.

I. The History of the Establishment Clause and the Philosophies of the Framers Indicate that Mass. G.L. c. 138, § 16C, does not Injure Any Interest Protected by that Clause.

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..

What does this language mean? It has been characterized as "at best opaque" by this Court. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). It has also been stated that the Establishment Clause, in the words of Jefferson, "'was intended to erect a wall of separation between church and State.'" *McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948), *quoting Everson* v. *Board of Education*, 330 U.S. 1, 16. Is this so, and, if so, what is the nature of that wall?

Although it is true that "[a] too literal quest for the advice of the Founding Fathers" is often "futile," *Abington School District* v. *Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring), it may be valuable to examine the history of the Establishment Clause, in order that we may ascertain the evils which they sought to guard against and the values which they sought to preserve. The purpose of the Religion Clauses "was to state an objective, not to write a statute." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). Perhaps a look into history may help to clarify the objective of the Founding Fathers.

A. *Religion in the Colonies.*

The story of religion in the American colonies, and in the countries from which the colonists came, has been often told. Mr. Justice Black summarizes it in *Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947):

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which

> these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. [Footnote omitted.]

See Cobb, *The Rise of Religious Liberty in America* c. II (1902) (hereinafter cited as "Cobb").

Unfortunately, these "practices of the old world were transplanted to and began to thrive in the soil of the new America." *Everson* v. *Board of Education*, 330 U.S. 1, 9.

> The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. . . . [D]issenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

Id. at 9-10 (footnotes omitted). See *Engel* v. *Vitale*, 370 U.S. 421, 427-428 (1962); Cobb, cc. IV & V; Marnell, *The First Amendment: The History of Religious Freedom in America* (1964), cc. 4-6 (hereinafter cited as "Marnell"); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 79-83 (1962) (hereinafter cited as "Kruse").

At the outbreak of the American Revolution, the Church of England was established in every colony from Maryland to Georgia and in part of New York; and the Congregational churches enjoyed a privileged position in Massachusetts, Connecticut, and New Hampshire. Only in Rhode Island, Pennsylvania, New Jersey, and Delaware was there a separation of Church and State. *See, e.g.*, 1 Morison & Commager, *Growth of the American Republic* 241 (1950); Cobb, c. IX; Kruse, 94-107. And even in these four, although there was no established church, it appears that there were various forms of discrimination. See *Engel* v. *Vitale*, 370 U.S. 421, 428, n.10 (1962).

The struggle for religious freedom was carried on by many men and women at different times and places. One of the foremost was Roger Williams (*c.* 1603-1682/83), whose colony of Rhode Island "became the New World haven for the discontented and the oppressed." Marnell, 102. See 1 Stokes, *Church and State in the United States* 195 (1950) (hereinafter cited as "Stokes").

Roger Williams believed that there should be a "wall of separation between the garden of the church and the wilderness of the world . . . ." Miller, *Roger Williams: His contribution to the American tradition* 98 (1953). As the late Professor Mark DeWolfe Howe put it:

> When the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained.

Howe, *The Garden and the Wilderness* 6 (1965) (hereinafter cited as "Howe"), *quoted in* Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 96-97 (hereinafter cited as "Katz").

B. *The State Constitutions.*

During the course of the American Revolution, the thirteen states adopted constitutions, which reflected their attitudes toward Church and State. Later states tended to copy the constitutions of the original thirteen, particularly the preamble and bill of rights, which contained the language pertaining to religion. Although space does not permit a discussion of these constitutions, the following summary prepared by Cobb in 1902 is instructive:

> The points on which all the state constitutions are at one are as follows: —
>
> 1. No legislature can pass a law establishing religion, or a Church. To effect such purpose a change in the constitution would be required.
> 2. No person can be compelled by law to attend any form of religious service; or, —
> 3. To contribute to the support of any such service or Church.
> 4. No restraint can be put by law on the free exercise of religion; or, —
> 5. On the free expression and promulgation of religious belief. *Provided* always, that this freedom "shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State."

Cobb, 520.

C. *Virginia.*

Our story must now focus on Virginia, because it is there that the principal battles for religious liberty were fought leading up to the adoption of the First Amendment. *See e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1, 33, n.11 (1947) (Rutledge, J., dissenting); Stokes, 366 *et seq*.

In Virginia, the Church of England was more strongly established than anywhere else. Marnell, 103. When the State Constitutional Convention met in 1776, it received many petitions from various parts of the state, expressing the widespread desire for, *inter alia*, "protection in the full exercise of their modes of worship," exemption from "payment of all taxes for any Church whatever," and the disestablishment of the Church of England. Cobb, 490-91.

The Virginia Bill of Rights passed the Convention on June 12, 1776, three weeks before the Declaration of Independence was adopted in Philadelphia. Section 16, as originally drafted by Patrick Henry, provided "that all men should enjoy the fullest toleration in the exercise of religion . . ." *Id.*, 491. Madison objected to the word "toleration," stating that "[t]oleration belonged to a system where [there was] an established Church, and where a certain liberty of worship was granted, not of right, but of grace . . . ." *Id.*, 492. He obtained the substitution of the following sentence: "all men are equally entitled to the full and free exercise of religion. . ." *Id.*

When the first session of the Virginia House of Delegates assembled in October, 1776, a Committee on Religion, of which Thomas Jefferson was chairman, was appointed "to take under their consideration all matters and things relating to religion and morality . . . ." Stokes, 380-81. Various petitions from dissenting groups were referred to the Committee. Among these was one from Prince Edward County, which hailed the Bill of Rights as "the rising sun of Religious liberty . . .," and insisted that, "without delay, all Church establishments might be pulled down, and every tax upon conscience and private judgment abolished." Schachner, *Thomas Jefferson: A Biography* 157 (1951) (hereinafter cited as "Schachner").

After a hard contest, the House resolved to repeal all acts of Parliament which had made criminal offenses of dissenting religious opinions, failure to attend the established Church, and the exercise of different modes of worship. *Id.*, 158; Stokes, 381. It was also decided to exempt dissenters from enforced contributions to the Church of England; and it was agreed, as a temporary war measure, to suspend the compulsory payment of salaries to Anglican clergymen. Schachner, 158; Cobb, 492-93.

The payment of salaries to Anglican clergymen, suspended from year to year since 1776, was finally discontinued in 1779, and, in 1780, dissenting ministers were empowered to celebrate marriages. Stokes, 383.

The established Church did not surrender without a fight, and, furthermore, it acquired allies. Some of the dissenting churches, while they joined in the demand that the Church of England be dethroned, were not necessarily in favor of complete disestablishment. "Some of them . . . demanded multiple establishments — in which, naturally, their own church would be included — and the use of the power of the State to compel the communicants of each adequately to support, through tithes and taxes, the church of which they were members; or, better still, a general collection by the State and due allocation to the respective churches." Schachner, 157.

The principle of multiple establishments was embodied in the *Bill Establishing a Provision for Teachers of the Christian Religion*, which was introduced in 1784. The Bill provided, in part:

> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers . . . and it is judged that such provision may be made by the Legislature, without counter-

> acting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;
>
> *Be it therefore enacted by the General Assembly,* That for the support of Christian teachers,   per centum on the amount, or   in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed . . ..
>
> . . . .
>
> *And be it enacted,* That for every sum so paid, the Sheriff . . . shall give a receipt, expressing therein to what society of Christians the person . . . shall direct the money to be paid . . ..

Everson v. *Board of Education*, 330 U.S. 1, 72-73 (1947) (Rutledge, J., dissenting, Supplemental Appendix). Of course, the effect of this Bill, if enacted, would have been to establish all Christian churches and religions at the expense of Jews and other non-Christians. See Cobb, 496.

There was great support for this Bill, which was backed by George Washington, Patrick Henry, Richard Henry Lee, and John Marshall, among others. Cobb, 495. Even the Presbyterian clergy supported it, causing Madison to observe to Monroe that they "seem as ready to set up an establishment which is to take them in as they were to pull down that which shut them out." Stokes, 390. The Bill passed second reading in December, 1784, and was almost enacted. But Madison and his followers managed to defer final consideration until December, 1785. Before the Assembly reconvened in the fall, he issued his historic *Memorial and Remonstrance against Religious Assessments. See Everson*, 330 U.S. 1, 37 (Rutledge, J., dissenting).

Madison's *Memorial and Remonstrance* was relied on in *Everson* both by Black, J., and by Rutledge, J., and was printed in full as an appendix to Mr. Justice Rutledge's dissent. *Everson*, 330 U.S. 1, 12, 37-38, 63-72. Madison argued, as paraphrased by Mr. Justice Black,

> that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

Everson, 330 U.S. at 12. The *Memorial and Remonstrance* was widely distributed in June and July, 1785, with the result that the Bill was killed by the Assembly in October. Stokes, 390-91.

During this same period, Jefferson was at work on his great *Bill for Religious Liberty*, which was first introduced in the Assembly in 1779. Schachner, 160; Cobb, 497. When Jefferson went to France in 1784, Madison became the chief advocate for this Bill, which became law on January 16, 1786. Schachner, 159; Stokes, 392.

The Bill, which Jefferson considered one of his three greatest achievements, stated, in the preamble, among other things, that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind,

> yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . ."

And the statute itself enacted

> "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ."

Everson, 330 U.S. at 12-13 (footnote omitted); Stokes, 392-394.

D. *The Adoption of the First Amendment.*

Although disestablishment was accomplished in Virginia, there were still various kinds of establishments and anti-establishments in other states, when the Constitutional Convention met in Philadelphia in May, 1787.

> Some states, for example, demanded belief in heaven and hell. Three barred ministers from public office. One restricted liberty to Protestants and demanded active church membership. Another demanded belief in Trinitarian Christianity. Some provided tax revenues for the support of churches; others forbade this use of tax revenues.

Marnell, 111. Perhaps this diversity of views accounts for the fact that the only reference to religion in the Constitution is found in Article VI, Clause 3, which states:

> [N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The Constitution went into effect in 1788, and, on May 4, 1789, four days after the inauguration of President Washington, Madison announced to the first House of Representatives, in New York, that he intended to propose Amendments to the Constitution. Stokes, 538. On June 8, Madison offered a series of proposed amendments for the approval of the House. *Id.*, 541. These included the following, which were intended to be added in Article I, sections 9 and 10 of the Constitution:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

Id. The word "national" was added to meet the objections of states which still had an established church. *Id.*

Madison's amendments were first referred to the House, sitting as a "Committee of the Whole," and later to a select committee, of which Madison was a member. *Id.* On August 15, 1789, the select committee report was debated by the House, again sitting as a Committee of the Whole. *Id.* At that time, Madison's "establishment" amendment had been rewritten to read as follows:

> [N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.

Id. See also, generally, Kruse, 67-71.

Following the reading of the amendment, the debate began. Mr. Sylvester, a representative from New York, feared that the amendment "might be thought to have a tendency to abolish religion altogether." Stokes, 542. Elbridge Gerry of Massachusetts said that it would read better if it said, "that no religious doctrine shall be established by law." *Id.* Mr. Sherman thought the amendment unnecessary "inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments . . .." *Id.*

Madison stated that these words meant to him

> that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. . . . [T]he words . . . had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion . . ..

Id.

Mr. Huntington of Connecticut, although agreeing with the Madisonian construction, feared that the clause might be construed so as to interfere with established religions in the states. Specifically, he was afraid that "a support of ministers, or building of places of worship might be construed into a religious establishment." *Id.* To this, Madison replied by suggesting that the word "national" be inserted before "religion." He believed "that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform . . .." *Id.*, 543.

Samuel Livermore of New Hampshire moved that the amendment should read, "Congress shall make no laws touching religion, or infringing the rights of conscience," *id.*, and his motion was carried thirty-one to twenty. A few days later, however, on August 20, 1789, on motion of Fisher Ames of Massachusetts, the clause was altered to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, 545.

In the Senate, the preliminary form of the clause was as follows:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . ..

Id., 546. The final language was hammered out by a conference committee, in which Madison played a large part. *Id.*, 546-547. Final agreement was reached on September 25, 1789 (*Id.*, 548) on the language as it stands today:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..

United States Constitution, First Amendment.

E. *The Lessons of History.*

Although we recognize that "the historical purposes of the religious clauses of the First Amendment are . . . obscure and complex . . .," *Flast* v. *Cohen*, 392 U.S. 83, 125 (1968) (Harlan, J., dissenting), we, nevertheless, will attempt to draw some conclusions based on the history which we have summarized.

1. Establishment Clause Intended to Restrain Only Federal Government.

The Establishment Clause provides that "*Congress* shall make no law *respecting* an establishment of religion . . ." (emphasis supplied). Thus, it was only the federal government which was restrained, and Professor Tribe is undoubtedly correct when he notes that "[a]t least some evidence exists that, for the Framers, the establishment clause was intended largely to protect state religious establishments from national displacement." Tribe, *American Constitutional Law* 819 (1978) (footnote omitted) (hereinafter cited as "Tribe"). For example, Massachusetts, until 1833, authorized towns to maintain ministers where voluntary contributions were inadequate. *Id.*, 819, n.24. Of course, this bit of history is now obsolete, since the Religion Clauses have been made applicable to the states by the Fourteenth Amendment as interpreted by this Court. *See, e.g.*, *Abington School District* v. *Schempp*, 374 U.S. 203, 215-216 (1963).

2. The Meaning of Nonestablishment.

Whatever disagreements the framers may have had, there was consensus that the federal government "could not establish a state religion or afford privileges to any religious group or impose disabilities on any individual on the basis of religious preference or affiliation." Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILLANOVA L. REV. 3, 9 (1979) (footnote omitted) (hereinafter cited as "Kurland"). This consensus was expressed as follows by Mr. Justice Story, in 1851:

> The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution . . ., and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

2 Story, *Commentaries on the Constitution of the United States* § 1877 (2nd ed. 1851) (footnote omitted) (hereinafter cited as "Story").

These statements by Professor Kurland and by Justice Story express, we submit, the core concept of the Establishment Clause, as it was understood by the Founding Fathers. One principle which emerges from these statements, and from others, is that a central purpose of both Religion Clauses "was to protect religious liberty — to prohibit the coercion of religious practice or conscience . . .." Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. of Pitt. L. Rev. 673, 677 (1980) (footnote omitted) (hereinafter cited as "Choper"). *See Everson* v. *Board of Education*, 330 U.S. 1, 8-11 (Black, J.), 53-54 (Rutledge, J., dissenting) (1947).

"The practice perceived by the Framers as perhaps the most serious infringement of religious liberty sought to be corrected by the Establishment Clause was forcing the people to support religion by the use of compulsory taxes for purely sectarian purposes." Choper, 677 (footnote omitted). This was the main point of Madison's *Memorial and Remonstrance* and one of the main points of Jefferson's *Bill for Religious Liberty*. *See Everson*

v. *Board of Education*, 330 U.S. 1, 12-13 (Black, J.), 35-41, 63-74 (Rutledge, J., dissenting) (1947). Furthermore, Cobb's survey of state constitutions (*supra*, section B) in 1902, revealed that all constitutions provided that no person could be compelled by law to contribute to the support of any religious service or Church. Cobb, 520.

3. Application to This Case.

To sum up, the Establishment Clause, for the Founding Fathers, meant at least this: first, the government could not establish a state religion. "'Establishment' . . . connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). As we have just noted, "financial support" often took the form of taxes. Second, the government "could not afford privileges to any religious group or impose disabilities on any individual on the basis of religious preference or affiliation." Kurland, *supra* p. 26.

We submit that, under both of these tests, Mass. G.L. c. 138, § 16C, does not violate the Establishment Clause.

It is, of course, true that this type of zoning statute was probably unknown in the United States of 1790, although it is widespread today (J.S. 24, n.16). As Mr. Justice Brennan has pointed out, the "statesmen who fashioned the religious guarantees . . . were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed." *Abington School District* v. *Schempp*, 374 U.S. 203, 237 (1963) (footnote omitted). Professor Kurland states that, with the exception of cases like *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), and *Engel* v. *Vitale*, 370 U.S. 421 (1962), "the modern day cases fall within neither the language of the first amendment nor the intent of its authors." Kurland, 25.

Regarding such "modern day cases," Professor Kurland asks, "How should the Court undertake to decide cases for which there is no basis for resolution in the constitutional text?" *Id.* Of course, this Court has formulated a number of tests as an aid to the decision of such cases. *See, e.g.*, *Committee for Public Education* v. *Regan*, 444 U.S. 646, 653 (1980). We will not discuss these tests and the cases decided under them, because they have been more than adequately discussed in the brief of the Alcoholic Beverages Control Commission. We fully subscribe to the arguments made there.

Beyond the tests formulated by the Court, or perhaps in conjunction with them, we submit that the Court must be guided by a philosophy regarding the proper place of religion in American society. Professor Tribe tells us that there were at least three schools of thought which influenced the authors of the First Amendment, those associated with Roger Williams, Thomas Jefferson, and James Madison. Tribe, 816. We have already examined the ideas of Jefferson and Madison, primarily because it is their ideas which have received the most attention in the Court's historical inquiries. *See, e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (Black, J., for the Court, and Rutledge, J., dissenting).

Notwithstanding the views of Justices Black and Rutledge, Professor Kurland may be correct in his statement that "[l]ittle basis exists for the claim that the Jeffersonian 'wall of separation' was the guide to the formulation of the . . . religion clauses . . . ." Kurland, 13. We have seen that these clauses were the product of a committee and were "accepted by a Congress only partially moved and controlled by Madison's thinking." Kruse, 72. Finally, we must remember that "there is little if any mention in this country of the term 'separation of,' or 'between,' 'Church and State,' until it was used by Thomas Jefferson in his letter to the Danbury Baptists in 1802." Stokes, 27.

Even if we concede that the Establishment Clause was based entirely on the thinking of Jefferson and Madison, we submit that they would have favored the statute here in question. Space does not permit an examination of their religious beliefs, but we submit that the following quotation from Mr. Justice Story applies to them and to most of the framers of the Constitution:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Story, § 1874 (footnote omitted). As Mr. Justice Black observed in *McCollum* v. *Board of Education*, 333 U.S. 203, 211-212 (1948), "A manifestation of . . . hostility [to religion] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."

As we have noted, Roger Williams is considered one of the Founding Fathers of religious liberty. See Tribe, 816-817. In the judgment of Professor Mark DeWolfe Howe, the prohibitions of the Religion Clauses:

> . . . at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than of Jefferson's. . . . [T]he predominant

> concern at the time when the First Amendment was adopted was not the Jeffersonian fear that if it were not enacted the federal government would aid religion and thus advance the interest of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth.

Howe, 10, *quoted in* Katz, 97. Professor Katz comments, "The Williams principle of separation does not forbid all government aids to religion, but only those incompatible with full religious freedom." Katz, 97. We submit that the statute in question, if it is an "aid to religion," is an aid which is "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970).

Speaking of modern problems unknown to the framers, Professor Donald Gianella observed in 1968:

> [T]he founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order. In their view the state was to maintain the public peace and security so that individuals and groups would be free to shape their own destinies. But now that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors. To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result in deprivations

> not demanded by the purposes of nonestablishment but in some cases will actually frustrate them.

Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (Part II, "The Nonestablishment Principle"), 81 HARVARD L. REV. 513, 514-515 (1968).

Turning specifically to zoning, Gianella says:

> Comprehensive zoning ideally envisions a master plan for allocation of land to achieve "favorable environments in which to live and work." The state therefore must make precisely the kind of decision that the absolute separationist believes it must avoid at all costs: determination of the proper place to be accorded the religious use of property in planning an environment suited to modern life. This decision requires a direct inquiry into the role that religion plays in the life of the citizenry. . . .
>
> The greatest number of zoning ordinances grant special exemptions for churches in residential areas provided they do not cause traffic hazards, congestion, or excessive and untimely noise. . . . A decline in the economic value of surrounding property, if there is one, is considered a necessary and incidental result of the zoning process itself . . ..
>
> . . . .
>
> [I]n planning a total environment the zoning authorities are compelled to determine the relative value to be accorded religious uses in their calculus, and the establishment clause cannot be read to require religion to take a position of lowest priority. Where you have such total planning, the establishment clause only bars the government from assigning religion a rank in excess of that which accords with the freely determined values of the community . . ..

Id. at 538-539, 541 (footnotes omitted).

We have quoted Professor Gianella at length, because we believe that his approach charts the wisest and safest "neutral course between the two Religion Clauses . . . ." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). When Mr. Justice Douglas observed in *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), that "[w]e are a religious people whose institutions presuppose a Supreme Being," he was stating a basic philosophy, which, we submit, should guide all interpretations of the Establishment Clause. We submit that this philosophy guided the Founding Fathers and should guide the Court today.

II. THE HISTORY OF ALCOHOLIC BEVERAGE REGULATION AND ZONING LAW INDICATES THAT MASS. G.L. c. 138, § 16C, DOES NOT INJURE ANY INTEREST PROTECTED BY THE ESTABLISHMENT CLAUSE.

A. *Historically, Commerce in Alcoholic Beverages has been Strictly Regulated.*

The strict control of commerce in alcoholic beverages is not of recent origin. In 1692, the Governor, Council and Representatives of the Province of Massachusetts Bay convened in General Court and enacted a comprehensive scheme of laws to control the sale and use of alcohol. Provision was made to license any "common victualer, innholder, taverner, or seller of wine, beer, ale, cyder or strong liquors by retail . . . ." 1 Acts and Resolves of the Province of Massachusetts Bay, (Province Laws 1692-93), c. 20, § 1. The conditions for licenses were established for the express purpose of "prevent[ing] the mischiefs and great disorders happening daily by the abuse of such houses . . . ." *Id.*, § 2. Gambling was prohibited in such houses. *Id.*, § [illegible]. Taxes were levied on wine. *Id.*, c. 21. Restrictions were placed on the sale of alcohol on the "Lord's Day." *Id.*, c. 22, § 3. Zoning restrictions were placed on the manufacture of alcohol by a requirement that "the selectmen of . . . Boston . . . or other market towns in the province . . . assign some certain places of each of said towns (where it may be least offensive) for the erecting or setting up of . . . still houses." *Id.*, c. 23. Although the specific terms may have changed, specific schemes of statutory control over the sale of alcohol have continued to the present day. *See* Mass. G.L. c. 138; 6 E. McQuillin, *Municipal Corporations* § 24.165 (3d ed. 1980).

If we examine Sunday closing laws, the most restricted activity among the fifty states, the District of Columbia, and Puerto Rico has been commerce in alcoholic beverages. In Appendix II to the opinion of Mr. Justice Frankfurter in *McGowan* v. *Maryland*, 366 U.S. 420, 551 *et seq.* (1961), it is shown that forty-two states had some restrictions against the sale of alcohol on Sunday, while only thirty-two states had restrictions on racing, twenty-eight states restricted boxing and hunting, eighteen restricted barbering, and thirteen restricted the sale of automobiles. The Sunday closing laws are analogous to the laws providing zones of protection to churches, schools, or similar land uses in that Sunday closing laws provide a day when the public can expect "rest, repose, recreation, and tranquility — a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the every day intensity of commercial activities . . .." *McGowan*, 366 U.S. 420, 450. Massachusetts G.L. c. 138, § 16C, provides the possibility for a similar sort of repose and tranquility in the zone around schools and churches.

B. *Churches and Schools are Part of a Class of Land Uses Traditionally Protected.*

The statute in question here, Mass. G.L. c. 138, § 16C, is part of a comprehensive scheme to control commerce in alcoholic beverages, but also has some attributes of a zoning law. Section 16C attempts to carve out a zone of protection around churches and schools. Both churches and schools are land uses which have been given legal protection to preserve the peace and tranquility of those who use them.

It has been held that a statute prohibiting desecration of a church did not unconstitutionally advance religion and that there is a rational basis for treating criminal damage to a church differently from criminal damage to other property. *State* v. *Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (1976). This is analogous to the protection given to cemeteries. Desecration of a grave is often an offence by statute and "[a]t common law it was a misdemeanor, and indictable as an offence "highly indecent and contra bonos mores: *King* v. *Lynn*, 2 Term R. 733, *Comm.* v. *Cooley*, 10 Pick. 37." *Craig* v. *First Presbyterian Church*, 88 Pa. 42, 53 (1878).

It is not "uncommon, even where gasoline stations are a permitted use within a particular district, for them to be prohibited within a prescribed distance from schools, churches, or other places of public assembly." 2 Rathkopf, *Law of Zoning and Planning* § 24.02(1) (footnote omitted). Thus, a zoning ordinance forbidding gas stations within two hundred feet of a school, church, or library has been upheld, as "[i]t is not the school or church building alone which suffers from the nearness of a gasoline station, but those who attend the church, and the children who go to school or play in the school yard." *Esso* v. *North Bergen Township*, 50 N.J. Super. 90, 95, 141 A.2d 81, 84 (1958). Such an ordinance has been held reasonable because "a filling station . . . would seriously interfere with the services at a church or school within one hundred feet of it . . .." *Cayce* v. *City of Hopkinsville*, 217 Ky. 135, 289 S.W. 223 (1926).

The Massachusetts statute in question, G.L. c. 138, § 16C, includes schools and churches within its scope. Some states have included other institutions among those that are granted a zone of protection from commerce in alcoholic beverages. Mississippi provides such protection to churches, schools, and funeral homes. Miss. Code Ann. § 67-1-51. Louisiana and Utah protect churches, schools, and libraries. La. Rev. Stat. § 280 and Utah Code Ann. § 16-6-13. Guam and Wisconsin protect schools, churches, and hospitals. Guam Civ. Code § 25208(a) and Wis. Stat. Ann. § 176.05(9m). In all, twenty-nine states and territories provide some sort of zone of protection for churches, schools, or similar activities from commerce in alcoholic beverages. *See* J.S. 24, n.16. In nineteen of these states, this "benefit" extends only to churches and schools. *See* J.S. 25, n.17. Another state provides that churches and schools shall have a 400-yard zone of protection from licensed houses of prostitution. Nev. Rev. Stat. § 201.380.

In each of the areas where a citizen lives, works, shops, plays, or prays, he or she has a different standard as to the level of privacy expected or quiet to be enjoyed. Churches and schools, like cemeteries, hospitals, and funeral homes, have been given greater legal protection than other land uses over a wide geographic area through most of our history. It is impossible to discover with certainty all of the reasons that have gone into creating this protection. But we suggest that these are areas of great emotional importance to the citizens and that protection of these areas may prevent actions so inherently inflammatory as to provoke the average person to retaliate, and, in protecting his church or his child's school, cause a breach of the peace of the commonwealth.

C. *Zoning has Developed as a Means of Controlling Land Use and the Quality of Life.*

The methods of controlling land use through zoning restrictions have grown greatly over the years. In 1692, particularly noisome activities were deemed "common nuisances" and areas were assigned at "certain places" where "distillers, chandlers and curriers shall exercise and practice their respective trades and mysteries . . . ." 1 Acts and Resolves of the Province of Massachusetts Bay (Province Laws 1692-93), c. 23, § 1. The cities and towns of the Commonwealth now have enacted comprehensive plans and zoning ordinances. As the law has progressed and the law of nuisance has given way to zoning, the purpose has remained the same, to prevent an inappropriate juxtaposition of land uses or "a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926). See 1 Rathkopf, *op. cit.*, § 1.01.

In *Young* v. *American Mini Theatres Inc.*, 427 U.S. 50, *reh. denied*, 429 U.S. 873 (1976), this Court reviewed a zoning ordinance which prohibited adult movie theatres from locating within 1,000 feet of any two other regulated uses, including, *inter alia*, bars, cabarets, and pool halls. The apparent intent was to prevent an undue concentration of such uses in any place. The constitutionality of the ordinance was upheld. Mr. Justice Powell said, in a concurring opinion, that "[o]ne half century ago this Court broadly sustained the power of local municipalities to utilize the then relatively novel concept of land use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)." *Young*, 427 U.S. 50, 73.

In the years since *Euclid*, "zoning has become an accepted necessity in our increasingly urbanized society." *Young*, 427 U.S. 50, 74. The "legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgment is to control in cases in which the validity of a particular zoning regulation is fairly debatable." *Id.*

Mr. Justice Powell also said that *Young* was the first case in which rights of free expression protected by the First Amendment were in conflict with a zoning ordinance, and that the court could not mechanically apply the doctrines developed in other contexts, but should engage in a careful inquiry into the competing concerns and interests involved. *Id.* at 76. In inquiring into the concerns and interests of the parties, a factor to be considered is that "[l]ocated in the midst of a congested business area," the Church "finds disturbing the prospect of licensed premises ten feet away." *Grendel's I* at 94. (*See* map inserted as an end paper in this brief.)

D. *The Benefit Conferred on the Church Here is Incidental to the Main Purpose of the Statute: the Creation of a Zone of Protection for Schools and Churches and the Regulation of Alcoholic Beverages Pursuant to the Twenty-first Amendment and the Police Power.*

This case presents to this Court for the first time a conflict between the rights of a restaurant, protected by the Establishment Clause, and the rights of the Commonwealth and the city of Cambridge, protected by the police power and the Twenty-first Amendment, to control the delivery or use of intoxicating liquors. In *New York State Liquor Authority* v. *Bellanca*, U.S. , 101 S.Ct. 2599, 69 L. Ed. 2d 357 (1981), it was stated that "[t]his Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. . . . It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold." *Id.*, at 101 S.Ct. at 2600, 69 L. Ed. 2d at 360.

This Court has previously held that the receipt by a religious group of "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Widmar* v. *Vincent*, U.S. , , 102 S. Ct. 269, 276, 70 L. Ed. 2d 440, 450 (1981). *See Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 771 (1973). The benefit conferred on churches and schools by section 16C is simply that they have a right, if they wish to exercise that right, to prevent the issuance of liquor licenses within 500 feet. *Arno* v. *Alcoholic Beverages Control Commission*, 377 Mass. 83, 86, 384 N.E.2d 1223, 1226 (1979). This benefit would seem to be incidental if one applies the test set forth in *Widmar* v. *Vincent*, U.S. , , 102 S. Ct. 269, 276, 70 L. Ed. 2d 440, 450 (1981), in that the benefits do "not confer any imprimatur of State approval on religious sects or practices," and the benefit is available to a broad class of secular private schools and public schools as well as to churches.

In conclusion, we have tried to show three things: first, that the sale and consumption of alcoholic beverages have been heavily regulated at least since the seventeenth century; second, that churches have traditionally received special protection; and third, that in most states, churches and other institutions are shielded from businesses selling alcoholic beverages. While "[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use," *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970), we agree with Mr. Justice Brennan that "'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Id.* at 680, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 294. In light of the history of the Establishment Clause (Argument I, *supra*), the history of the regulation of alcoholic beverages and the zoning protection afforded to churches, we submit that section 16C cannot be viewed as an "establishment of religion."

Conclusion.

For the foregoing reasons, appellant Cambridge License Commission requests that this Court reverse the decision in *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 102 (C.A. 1, 1981) (*Grendel's II*) and enter judgment for the appellants in accordance with the decision in *Grendel's Den, Inc.* v. *Goodwin, et al.*, 662 F.2d 88 (C.A. 1, 1981) (*Grendel's I*).

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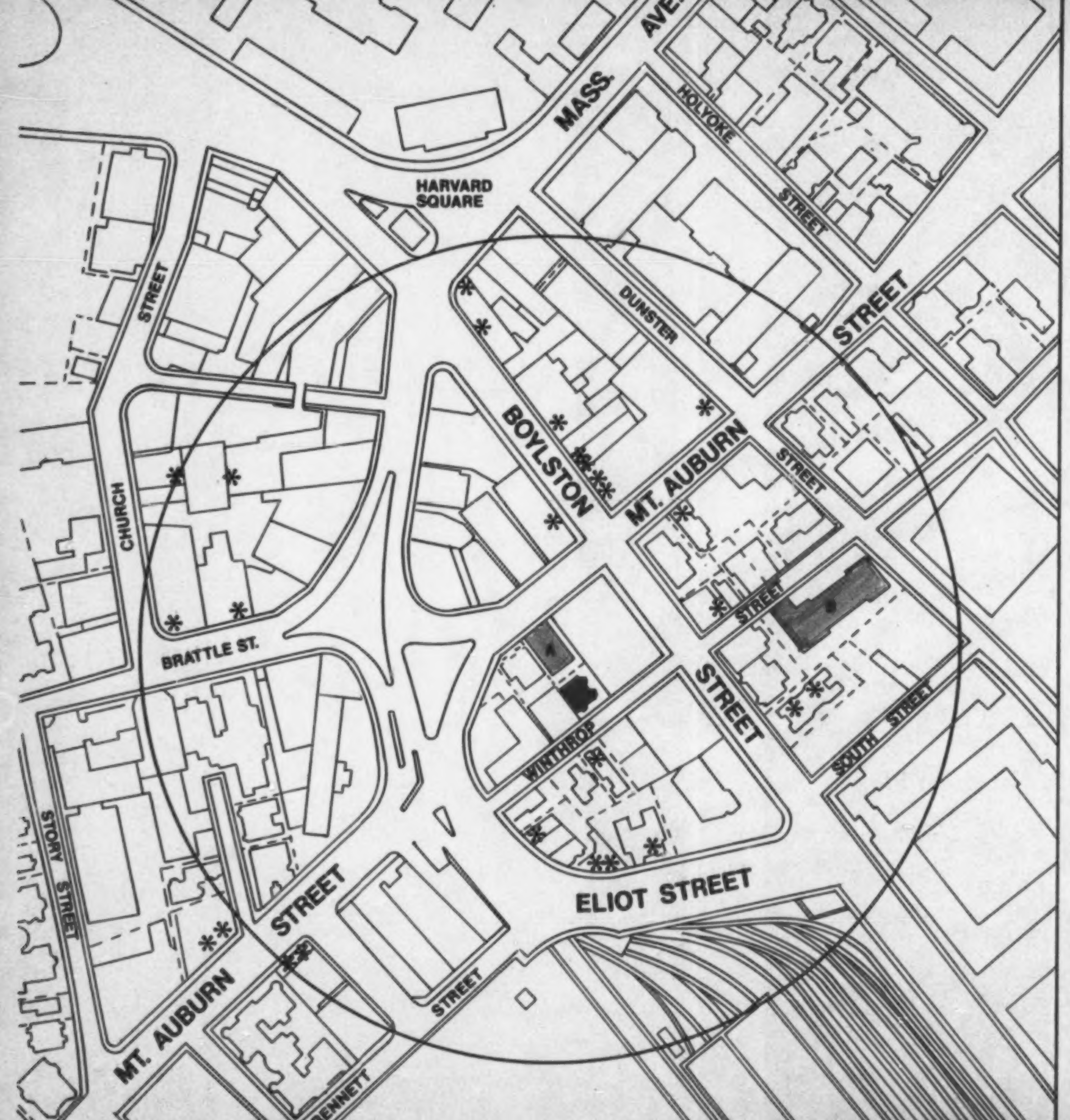

KEY

■ Grendel's Den

▨ A: Holy Cross Armenian Church
B: University Lutheran Church

* Licensed premises within 500 feet of Holy Cross Armenian Church as of Sept. 10, 1979.

Prepared by the Cambridge Community Development Department

Appellee's
Brief

Supreme Court, U.S.
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No. 81-878.

In the
Supreme Court of the United States.

October Term, 1981.

JOHN P. LARKIN, et al.,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN *en banc* JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Question Presented.

May a state delegate to each "church or synagogue . . . dedicated to divine worship" an unfettered governmental power to decide which restaurants, liquor stores, and bars may be licensed to serve or sell alcoholic beverages within a 500-foot radius of the religious body's premises?

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No. 81-878.

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

JOHN P. LARKIN, ET AL.,
Appellants,
v.
GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN *en banc* JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF APPELLEE

Statement of the Case.

At issue in this case is the validity of Massachusetts General Laws c. 138, § 16C ("Section 16C"), Brief of State Appellants ("State Br.") 2a-3a, which delegates to certain churches and synagogues — those that, in the statute's terms, are "dedicated to divine worship," *id.* 2a — an *ad hoc* and absolute veto power over the approval of each liquor license within a 500-foot radius of the church or synagogue.[1] Because it is providently located near the intersection of Mt. Auburn and Boylston Streets in Cambridge, and is invested by the State with an unreviewable veto power under Section 16C, the Holy Cross Armenian Catholic Parish Church ("Holy Cross Church") can and does exercise absolute regulatory authority over the acquisition of liquor licenses in virtually the entire Harvard Square area.[2]

The relevant facts have been stipulated. J.A. 48-52. In May 1977, after purchasing an existing liquor license, appellee

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[1] Section 16C also delegates such veto power to public and private schools, including parochial schools. On the prior versions of Section 16C, *see* n.29, *infra*. Selling liquor once the veto has been exercised — and one's license accordingly disapproved — is a crime punishable by a fine of up to $1,000 and/or up to 1 year's imprisonment. Mass. G.L. c. 138, § 2.

[2] Indeed, the absolutely unchecked nature of the regulatory power granted the Church under § 16C, as authoritatively construed by the state's highest court, *Arno* v. *Alcoholic Beverages Control Commission*, 377 Mass. 83, 90, 384 N.E. 2d 1223, 1228 (Mass. 1979), is made painfully obvious by appellants' answers to appellee's interrogatories 11 and 12. J.A. 32-38. Asked whether § 16C would allow a church to bar issuance of a license on the basis of the applicant's race, sex, religious affiliation, or political persuasion; on the basis of the applicant's failure to furnish a suitable "donation" to the church; or on the basis of "a pay-off by a competitor of the license applicant," the state appellants themselves, and the Attorney General's office, responded that § 16C "does not require the governing body of a church to state *any* reason for its objection to the issuance of a license to sell alcoholic beverages . . . ." J.A. 35, 37-38 (emphasis added).

At the hearing before the Massachusetts Alcoholic Beverages Control Commission ("ABCC"), the only commissioners who spoke both agreed that no limits exist on a church's power to veto licenses under § 16C. They thus stated that no evidence Grendel's might produce could alter the result, since "it really doesn't make any difference *what* the circumstances are, it [Section 16C] *always* applies when [a church] opposes [an application]." J.A. 63 (emphasis added).

ABCC Chairman Goodwin succinctly advised Grendel's: "the law mandates their [the Cambridge License Commission's] refusal, and I assume we are in the same position, because we are not going to declare a statute unconstitutional at this level." J.A. 60-61.

Grendel's Den, Inc. ("Grendel's") applied to appellant Cambridge License Commission ("CLC") for permission to transfer the license to its Harvard Square restaurant. In a letter sent to the CLC on May 25, Father Luke Arakelian of the Holy Cross Church entered a written objection to Grendel's application, J.A. 53, and on September 8 the State's Alcoholic Beverages Control Commission ("ABCC") upheld the CLC's May 31 denial of the license because "the governing body of the church objected to the license of the premises under provisions of Chapter 138, Section 16C and *this represents an absolute veto*." J.A. 24-25 (emphasis added). The ABCC expressly found "that the church's objection under Section 16C was the *only* basis on which the transfer was denied." *Id.* 25 (emphasis added).[3]

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[3] What basis the Church *itself* uses for deciding whether and when to object to the issuance of any given liquor license is less than clear on this record. *But see* Grendel's Amended Complaint, ¶ 12, in State's Appendix in Court of Appeals at 5 (alleging that Church requires monetary "contributions" from potential licensees as a prerequisite to not exercising its absolute veto power).

Proximity to the church is clearly *not* the dispositive variable. As was pointed out at the ABCC hearing, Holy Cross Church has opposed liquor licenses for premises located further from the church than others which it has not contested. For example, the church opposed a liquor license for the Swiss Alps Restaurant located at the outer edge of the 500-foot circle, but made no objection to licensing Casa Mexico, right across the street from the Church. J.A. 62-63.

Nor does it seem likely that "abuse" from Grendel's patrons was the touchstone for the church's decision. It is hard to imagine that the quiche-and-salad crowd which frequents Grendel's was a greater threat to the tranquility of church members than the denizens of Whitney's Bar and Grill or Jonathan Swift's Pub, or the clientele of the Harvard Provision Company's package liquor store on the same street (Mt. Auburn), less than one block away. *See* J.A. 69-72.

To be sure, Grendel's and the Holy Cross Church occupy visually similar brick buildings located on premises sharing a common rear property line. But the ten-foot distance between the two, stressed by appellants, State Br. 14, is wholly illusory, since it describes nothing but the distance between two blank (and quite solid) brick walls, each of which forms the rear of the building involved. Far more than a few drinks would be required to allow any patron

Grendel's then brought this action against the state and city appellants in the district court, challenging the validity of Section 16C under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Establishment Clause of the First Amendment, and the Sherman Act, 15 U.S.C. §§ 1, 2, as made controlling by the Supremacy Clause of Article VI. On August 14, 1980, the district court held that Section 16C on its face violated the Due Process and Establishment Clauses, J.S.A. 101A-133A, and further held that the state action exemption to the Sherman Act would provide no bar to a judicial declaration that defendants cannot deny a license under Section 16C where, as Grendel's offered to prove had been the case here, Section 16C's veto had in fact been used by the Church as part of an anti-competitive scheme. *Id.* 138A-142A.[4]

The First Circuit reversed. *Grendel's I*, J.S.A. 31A-100A. Upon Grendel's petition, however, the court granted rehear-

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of Grendel's to approach the Holy Cross Church by *that* route! Indeed, the sidewalk distance from the *door* of the Church, which is its only public entrance and faces north onto Mt. Auburn Street near its intersection with Boylston Street (one of the busiest motor and pedestrian crossings in Cambridge), to the *entrance* of Grendel's, which faces south on Winthrop Street (a one-block alley), is roughly 400 feet, which greatly exceeds the distance from the church door to several other licensed establishments along Boylston Street, as even a cursory look at the map appended to the back cover of appellant CLC's brief reveals. *See also* J.A. 69-72.

[4] Grendel's argued in the district court that the "state action exemption" to the Sherman Act, announced by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1942), did not apply in cases where, as here, the only state action involved routine ratification and implementation of entirely private anti-competitive choices. The district court agreed that, for this reason, the state-action exemption had no application here. J.S.A. 138A-142A. The court of appeals unanimously upheld that conclusion, *id.* 86A-89A, and appellants have not contested it since. *See* State Br. 13 n.11. If this case were to proceed to trial, Grendel's antitrust and other "as applied claims [would] remain open for further litigation." *Id.* 9 n.6.

ing *en banc*, J.S.A. 149A, and then affirmed the district court's judgment. *Grendel's II*, J.S.A. 1A-30A. The court of appeals recalled that "consistent judicial tradition [holds] that legislation conditioning the receipt of any significant benefit, power, or privilege on the commitment of the members of the recipient group or institution to a religious faith is inherently a 'law respecting an establishment of religion'", and is therefore void under the Constitution of the United States. *Id.* 21A. The court reasoned that Section 16C's "non-generalized grant to churches of . . . absolute discretion to confer or withhold an important commercial privilege . . ." squarely violates this long-settled maxim because it "distributes benefits on an *explicitly religious basis*." *Id.* 14A-15A (emphasis in original). The grant of "specialized political power" on this basis, *id.* 12A, the court held, has a "'primary' or 'principal' effect of advancing religion." *Id.* 23A.[5]

The court also noted that Section 16C would allow its church beneficiaries to "bargain over the sale of . . . an indulgence" with each neighbor who seeks a liquor license. *Id.* 12A. Whether or not such bargains have been struck, *see* n.3 *supra*, it is undisputed that they *might* be; that there are at least twenty-six establishments possessing Massachusetts liquor licenses within the 500-foot circle controlled by the Holy Cross Church, J.A. 49; and that at least fourteen of these licenses have been established in the last ten years — the decade throughout which the Holy Cross Church has consistently opposed Grendel's attempt to acquire such a license.[6] Although appellants describe the veto power through which the Church has achieved this result as "a less restrictive alternative to a broad ban on the sale of liquor," State Br. 38; *id.* 18, it is plain that the challenged delegation of *ad hoc* veto power establishes a dependence of each applicant upon the holder of such power that a mandatory ban, and even an all-or-nothing ban imposable at the holder's option, would not. In fact, insofar as a selective ban unequally disables Grendel's and unequally aids its nearby competitors, the economic impact of such capricious power upon a restaurant such as Grendel's makes Section 16C far *more* "restrictive" than a uniform ban could possibly be.

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[5] The court was unable to find any possible interpretation of the statute which would *not* violate the Establishment Clause. As the majority put it:

> We are of course aware that, if possible, statutes are to be construed to avoid constitutional defects. But no reasonable reading by us of "church," when expressly defined as "a church or synagogue building dedicated to divine worship," can transform section 16C into a religiously neutral law . . . . We consequently are forced to the conclusion that section 16C's language at the very least distinguishes between religious and nonreligious groups by granting significant rights to the former that it withholds from the latter.

Id. 15A-17A. The court of appeals found it unnecessary, on its *en banc* rehearing, to reach the due process or antitrust arguments, since the establishment clause flaw in Section 16C was found to be fatal. *Id.* 9A.

Finally, whatever values of tranquility and temperance might be associated with a genuine liquor-free area, any virtue claimed for Section 16C must necessarily be very different:

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[6] The 500-foot circle that centers upon the objecting church in this case encompasses not only appellee's restaurant but virtually the entire area known as Harvard Square, the celebrated business and entertainment center of Cambridge. Curiously, even the initial First Circuit decision reversing the district court's judgment, *see* J.S.A. 31A, seems to have acknowledged that the Constitution would bar giving churches "power to 'veto' licensing within an excessively broad radius such as five miles." *Id.* 79A n.9. But if five miles is "excessively broad," it is a mystery why a radius sufficient to engulf nearly all of Harvard Square is not. Indeed, the present law has the very effect the First Circuit initially condemned, since virtually every major commercial and entertainment area in Massachusetts is within 500 feet of *some* church. At all events, the gist of Grendel's challenge to Section 16C is that it entrusts governmental power to churches. The particular *radius* of the sphere of influence thereby ceded to religious bodies — whether ten feet or ten miles — is constitutionally immaterial: the First and Fourteenth Amendments were not, after all, written with straightedge and compass.

not in living memory has this or any other "million square feet" of Harvard Square, J.S.A. 13A, been the serene and sober retreat that appellants describe Section 16C as designed to secure for those churches and schools that seek to shield their members from "noise and distractions," State Br. 17; *id.* 45, 48, "while they [attend] as well as while they go to and from such facilities." *Id.* 53, 60; CLC Br. 34.

The precise question posed by this case, therefore, is *not* whether a state may "accommodate the diverse interests of its citizens," State Br. (Question Presented), by directing a public agency to give due weight to their needs and desires to be shielded "from the disturbances associated with the [nearby] distribution and consumption of liquor." *Id.* The question is whether a state may do so by conferring upon selected private bodies, defined in terms of their religious aim and character, an ultimate and unreviewable governmental power to forbid otherwise lawful private activities, and otherwise permissible uses of private property, on whatever grounds such private bodies deem appropriate — including grounds that would clearly be forbidden to the state itself.

Summary of Argument.

Conferring upon church leaders the uncontrolled power, within a 500-foot radius, to decide who may serve or sell liquor to whom invests ecclesiastical officials with governmental authority in clear contravention of the ban on state establishment of religion under the First and Fourteenth Amendments.

This violation is aggravated by the narrow, discriminatory, and content-based definition of the religious bodies to whom such political power is entrusted: only those devoted to the worship of God are eligible.

Nor would this delegation of veto power have been constitutional even if the favored class had included all religious groups, or even all private bodies arguably in need of nearby tranquility. For the submission of personal liberty and private property to the standardless and unreviewable control of *any* private body independently violates due process.

Finally, it is beside the point to ground the state's delegation of such control in the Tenth Amendment or in the Twenty-first. Neither of these sources of state authority confers upon any state a license to ignore the First and Fourteenth Amendments, or to delegate governmental power in derogation of these constitutional protections.

I. By Investing Selected Church Officials with Coercive Civil Authority, Section 16C Restores the Ill-Fated "Fusion of Governmental and Religious Functions"[7] That the Establishment Clause was Specifically Designed to Forbid.

Despite appellants' repeated insistence that Section 16C involves none of the evils against which the Establishment Clause was directed, State Br. 19, 47, 49; CLC Br. 28, 33, 39-40, or that its violation of the Establishment Clause is at worst *de minimis*, State Br. 54, 57; CLC Br. 39, it is hard to imagine a law more precisely or completely embodying *the* central evil of establishment: "religious . . . control over our democratic processes," *Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring and dissenting), in which a "concert or union" of "Church and State," *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952), links "priesthood and magistracy in arbitrary rule." B. Bailyn, Ideological Origins of the

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[7] *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963).

American Revolution 98-99 n.3 (1967) (discussing Americans' "[f]ear of the conjunction of civil and ecclesiastical tyrannies").[8] As the Revolutionary crisis progressed,

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[8] Eighteenth-century Americans tended to associate the concept of an "established" church with the danger of *political oppression*, not simply with a denial of *religious freedom*. Indeed, to many Americans in the years immediately preceding the Revolution, "the only use of an established church and clergy in society . . . [was] to enforce obedience to civil sanctions." Bailyn 253 (quoting Patrick Henry). For these people, like the famous Boston clergyman Jonathan Mayhew, English churchmen and the whole established church itself were merely instruments for "establishing a tyranny over the bodies and souls of men". Jonathan Mayhew, quoted in Bailyn 97. As the philosopher David Hume had expressed it, established churchmen were "enemies to liberty" and mere tools of "despotic power." D. Hume, "Of the Parties of Great Britain," reprinted in C. Hendel, ed., David Hume's Political Essays 86-87 (1953 ed.).

Because Americans of the Revolutionary period were so profoundly distrustful of both political and religious authority, the most awful oppression for them would combine both. To John Adams and others, the conjoining of "temporal and spiritual tyranny" spelled a fate totally "calamitous to human liberty." J. Adams, Works III, 450-451 (1851). And by far "the worst possible calamity a people could suffer would be the fusing of the canon law and feudal (aristocratic) law into [what Adams called] 'a wicked confederacy'" which would lead to "'civil and political slavery.'" C. Bridenbaugh, Mitre and Sceptre 237 (1962), quoting John Adams, Works III, at 449-450, 462. It was "a hatred, a dread, a horror, of the infernal confederacy [between civil and ecclesiastical law] . . . that [originally] projected, conducted, and accomplished the settlement of America." J. Adams, "A Dissertation on the Feudal and Canon Law," in Works III, at 451. This confederacy, after all, was the same one that had created the "oppressions" that drove Americans out of England in the seventeenth century; now, in the 1760s and 1770s, the same confederacy was seeking "to enslave all America." John Adams, quoted in Bailyn 98 n.3; Bridenbaugh 245, 280.

Perhaps the most obvious symbol to Americans of the dreaded combination of civil and church authority was the proposal circulated throughout the colonies that an Anglican Bishop be appointed for America. In the early 1760s, there were "profound fears" and "growing anxiety" "that an American episcopate was about to be established." Bailyn 96, 255. Americans could still remember the virtually absolute power commanded by Anglican Archbishop Laud in the early seventeenth century through his political influence, his persecutions, and his ecclesiastical courts; they had

Americans viewed every attempt to place governmental power at the disposal of a church as a dangerous consolidation of civil and ecclesiastical authority and as the very worst sort of "establishment" of religion. The *crucial* evil in creating such an established church, as far as the colonists were concerned, was not necessarily that people would be forced to submit to its *theological* beliefs, but that *governmental power* — the power of the state — would be placed at the church's service and command. *See* n.8 *supra*. In the Quebec Act of 1774, for example, the primary purpose of the British Government was "to accord some privileges to the Catholic Church, principally the right to sue for the collection of tithes." L. Pfeffer, Church, State, and Freedom 157 (1967). The Catholics were not granted monopoly status, nor was anyone required to submit to their beliefs; in fact, Protestantism "still retained principal government favor." *Id.* 158. Yet Americans were quick to attack the Act, claiming that its effect was to "'*establish* the Popish religion.'" *Id.* (emphasis added). In its list of grievances against Parliament in 1774, the Continental Congress gave a prominent place to the Act "'for *establishing* the Roman Catholic religion in the province of Quebec.'" *Id.* (emphasis added). The historical evidence thus makes plain

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come to "dread the Establishment of Bishops [*sic*] Courts" in America that would place their "civil liberties . . . in eminent [*sic*] danger," and they noted how seldom Bishops in general had "been favourable either to the religious or civil rights of mankind." Letters of John Rodgers and Micajah Towgood to Jonathan Mayhew, quoted in Bridenbaugh 243, 281.

Americans in fact came to view the episcopacy proposal as part of England's overall political and economic plan for subjugating the colonies, linking the proposal in their minds to the economic Stamp Tax placed on various commercial items. To them, "the Stamping and Episcopizing [of] our Colonies were . . . only different Branches of the same Plan of Power." *St. James Chronicle*, March 22, 1766. Ultimately, "[r]eligion and politics could never again be distinguished one from another after the uproar created in the colonies by the Stamp Act." Bridenbaugh 260.

that late eighteenth century Americans treated as objectionable "establishments" those legal arrangements that placed government power in church hands or provided for government enforcement of church decisions.

The legislative history of the Establishment Clause likewise confirms that, in prohibiting establishments of religion, the Framers sought more than merely to safeguard freedom of conscience. The following two alternative versions of the First Amendment were proposed in the Senate but rejected:

> Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed;

and

> Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the right of conscience be infringed.

Journal of the First Session of the United States Senate, p. 70 (September 3, 1789). If preferential treatment of one religion over another, and invasion of religious freedom of choice, were the only evils the Framers wanted to prohibit, either of these versions would have sufficed, and each indeed seems to convey this limited meaning far more clearly and explicitly than does the broad version which the Framers ultimately adopted.

Thus, the very use of the term "establishment of religion," as opposed to either of the narrower options, corroborates what the record of the Revolution and its concerns compellingly suggests — namely, that the First Amendment was intended to do more than simply protect Americans from direct or indirect compulsion to worship at, or contribute to, churches not of their choosing; it was designed as well, and indeed centrally, to prevent precisely the type of oppression, resulting from a combination of church and state authority, that they had feared and fought so long. Its "object . . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority," *Abington*, 374 U.S. at 217, quoting from the dissent of Justices Rutledge, Frankfurter, Jackson, and Burton in *Everson* v. *Board of Education*, 330 U.S. 1, 31-32 (1947).

Indeed, even the Massachusetts Bay Colony, which had perhaps the strongest established church in America during the colonial and Revolutionary periods, insisted from its earliest days on separating the secular tools of civil power from the spiritual authority of the church.[9] What is most significant

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[9] The colonists in early Massachusetts, as well as the other colonies, deliberately and overtly separated the powers available to their civil and church authorities. In fact, most colonies created a "double jurisdiction" of church and state, so that any given misdeed would be dealt with separately by each institution. Thus, Anne Hutchinson was tried twice — once by the church and once by the colonial government — for her supposed blasphemy. G.L. Haskins, Law and Authority in Early Massachusetts 89 (1960). The church could *censure* Robert Keayne for "making excessive profits on the sale of goods," *id.* 90, but at the same time "[n]o church censure" could "degrad [*sic*] or depose any man from any Civill dignitie, office, or Authoritie he shall have in the Commonwealth." Liberties of the Massachusetts Colony ¶ 60 (1641). And while the "civill Authoritie hath power and libertie to see the peace, ordinances, and Rules of Christ observed in every church," it could do so only "*in a Civill and not in an Ecclesiastical way.*" Liberties of the Massachusetts Colony ¶ 58 (emphasis added).

The Massachusetts church leadership clearly recognized this concept of "double jurisdiction" in its synods and official doctrines. The Cambridge Synod and Platform of 1648, for example, stated categorically that "Church-government stands in no opposition to civil government of comon-welths, nor any intrencheth upon the authority of Civil Magistrates in their jurisdictions." It was "unlawfull for church-officers to meddle with the sword of the Magistrate," or for the Magistrates to intrude upon the domain of the for present purposes is that the despotic "fusion of governmental and religious functions," *Abington*, 374 U.S. at 222, from which the Framers and their forebears fled was in fact exemplified in significant part by *practices in England that were nearly identical to those reenacted on American soil by Section 16C*, although such practices had been rejected even in the American colonies that harbored established churches around the time of the Revolution. These practices involved legal arrangements which gave Anglican church officials direct con-

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churchmen or "to compell their subjects to become church-members." The Cambridge Synod and Platform (1648), reprinted in W. Walker, The Creeds and Platforms of Congregationalism 235-236 (1893).

Virginia had a similar system of separating the exercise of civil and church power. The first meeting of the General Assembly in 1619, for example, passed a law which provided that if an individual were found drunk "for the first time he is to be reprooved *privately by the Minister*, and second time, *publiquely*, the third time to lye in boltes 12 houres in the House of the Provost Marshall & to paye his fees, and if he still continue in that vice, to undergo such severe *punishment, as the Governor & Councell of Estate shall think fitt* to be inflicted on him." Laws Bearing Upon Religion and Moral Conduct, And Concerning The Indians Adopted at The First Meeting of the General Assembly in 1619, reprinted in G. M. Brydon, 1 Virginia's Mother Church and the Political Conditions Under Which it Grew 422 (1947) (emphasis added). Thus, ministers played a role in maintaining discipline throughout society, but when the instruments of civil power — most specifically, severe punishments — were involved, the civil authorities had to make the final determination.

Even Roger Williams, as a dissenter in Massachusetts and then as founder of Rhode Island, where there was no established church, believed in a rigid separation between the tools and tactics available to magistrates and ministers. To Williams, "the *conscience* of the *Civill Magistrate* . . . bound [him] to preserve the *civill* peace and quiet of the *place* and people under him," but "[t]o batter downe *Idolatry, false worship, heresie, schisme, blindnesse, hardnesse* . . . [those] *spirituall strong holds* in the soules of men, *Spirituall Artillery* and *weapons* are proper. . . . [and] civill *weapons* are improper . . . and never able to effect ought in the *soule*." Roger Williams, "The Bloody Tenent of Persecution" (1647), reprinted in 1 P. Miller and T. Johnson, The Puritans 222-223 (1963) (emphasis in original). *See also* n.12 *infra*.

trol over the occupational liberty of groups as diverse as doctors and alehouse-keepers,[10] specifically delegating to selected churchmen the absolute power to veto individual liquor licenses in their vicinities whenever they might choose to do so. *See* 26 George II c. 31, Sec. 2 (1753).[11] Thus Section 16C reestablished in modern America a power characteristically conferred in England upon the Established Church but carefully withheld in our colonies even from the churches that had been "established" here. It is difficult to imagine a more direct or dramatic historical demonstration that the "establishments of religion" which the Framers meant to ban did indeed encompass the delegation to churches of power to veto nearby liquor licenses.

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[10] Church officials in England appear to have exerted extensive control over various occupations since the early sixteenth century. A law of 1511, for example, provided that "no person within the city of London" could hold the position of physician or surgeon "except he be first examined, approved, and admitted by the Bishop of London, or by the Dean of St. Paul's for the time being." Meanwhile, any individual wishing to practice medicine outside London was required to "be first examined and approved by the bishop of the same diocese, or . . . by his vicar general." 3 Henry VII c.11 (1511).

By the early seventeenth century, church officials had already been granted certain regulatory and policing powers specifically over the *liquor trade* and over *liquor use*. A 1623 law charged churchwardens, among several other groups, with reporting unlicensed liquor sellers and with prosecuting those licensed alehouse-keepers who served drunken persons within their establishments. 21 James I c.7 (1623). In 1627, churchwardens were assigned the responsibility, along with local constables, of enforcing "An act for the better suppressing of unlicensed alehouse-keepers" and were entrusted with the authority of levying the fines that the Act provided. 3 Charles I c.3 (1627).

[11] If ever a page of history could erase whatever doubts logic alone might leave, that page was surely written by England's experience, from the 1750's through the 1790's, in vesting the established clergy with discretionary authority to withhold the certificates of approval required by law whenever local applicants sought licenses to serve liquor. *See generally* S. & B. Webb, The History of Liquor Licensing, Principally From 1700 To 1830, Vol. 11 of English Local Government 34-39, 64, 69-74, 80-81 (1903). Predictably, "licenses were frequently restricted, in practice to adherents of the dominant sect." *Id.* 10 n.1; 38 n.1 ("Roman Catholics" denied licenses). The process was one in which the clergy often worked hand-in-hand with Justices of the Peace who were, as one contemporary described them, "men of profligate lives, needy, mean, ignorant, and rapacious." *Id.* 45; 50 n.1; 117. This "proved corruption of the Justices," *id.* 95, combined with the Free Trade movement to create strong support for total reform of the liquor licensing process, and the ultimate passage of the perhaps *overly* laissez-faire Beer Act of 1830: "The local veto exercised by the squire, the clergyman, and the principal inhabitants was ruthlessly broken down." *Id.* 126. It is note-

But the point would be analytically plain even if the history were less clear. For such veto power entails striking a balance among relevant land-use and other considerations and then enforcing that balance through law upon the entire community. Appellants necessarily concede that this is an inherently legislative task. State Br. 18, 29; CLC Br. 32. Yet, as is plain on the law's face, this legislative task is entrusted by Section 16C not to a body chosen by and accountable to the community but to schools and to those "church[es] or synagogue[s] [that are] dedicated to divine worship." In itself, such a delegation of governmental power to churches inescapably "establishes" religion.[12]

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worthy that such power, a major incident of "establishment" for the Church of England, was not resurrected in the colonies. *See* n.9 *supra*; n.16 *infra*.

[12] *See* pp. 9-11 *supra; see also* Part II *infra*. In conferring upon churches and synagogues the inherently governmental role of vetoing proposed land uses and effectively confiscating investments in liquor licenses, *cf. Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (taking private property is a function "traditionally associated with sovereignty"), Section 16C entrusts "'to religious societies as such a legal agency in carrying into effect a public and civil duty.'" *Walz* v. *Tax Commission*, 397 U.S. 664, 712 (1970) (Douglas, J., dissenting) (quoting James Madison). That the decision by a religious body is made conclusive by Section 16C only when the body *exercises* its veto, *see* J.S.A. 121A-122A (absence of church veto does not guarantee issuance of license), by no means shows that the power delegated is any the less governmental. After all, the veto power of the President under Article I, Section 7, Clause 2, is hardly rendered "non-governmental" in character by the fact that the provision allows the President unilaterally to *doom* legisla-

Worse, this delegation of power reinforces the classic evils of forbidden establishment by bestowing the state's political

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tion that cannot command two-thirds support in the House and Senate, but creates no analogous presidential power to *enact* legislation. If anything, the case with respect to Section 16C is even more compelling, since a church's veto cannot be overridden even by a unanimous vote of all the city and state officials involved in the licensing process.

Although religious bodies have the right, under this Court's decisions protecting church autonomy, *see Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), to make at least some binding decisions as to *their own members and officials*, some Justices have perceived even in that context a danger that blind enforcement of church decisions by government "can easily [make civil authorities] into handmaidens of arbitrary lawlessness." *Id.* at 727 (Rehnquist, J., joined by Stevens, J., dissenting). Indeed, as the Court recognized in the seminal case of *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871), the First Amendment in no way confirms for churches a plenary authority to exercise civil justice even over their own members. As the Court there observed,

> if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up.

Id. 733. The *Watson* Court concluded that "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference," and therefore that, "when a civil right depends upon an eccelsiastical matter, it is the civil court . . . which is to decide." *Id.* 730-731. *See also* n.9 *supra*.

A fortiori, when church decisions reach out to the broader public and dispose of the personal or pecuniary interests of non-members, it seems an understatement to say that making "available the coercive powers of civil [bodies] to rubber-stamp ecclesiastical decisions of . . . religious associations, when such deference is not accorded similar acts of secular voluntary associations, would . . . create . . . serious problems under the Establishment Clause." *Serbian Orthodox Diocese*, *supra*, at 734 (Rehnquist, J., joined by Stevens, J.).

bounty on a favored few religious bodies. It is true, as the state appellants observe, that those who gather at the religious institutions favored by Section 16C might play secular music or talk party politics as well as pray. State Br. 51-52, 81. But it is only the "governing bod[ies]" of entities "primarily devoted" to the "worship" of God[13] — a set of institutions defined expressly by the *content* of their discourse and beliefs — that enjoy the special status and power conferred by Section 16C. The content-based discrimination could hardly be more blatant: thus, the governing bodies of a meditation center, a branch of Alcoholics Anonymous, a hospital or library, a home for the aged or a day care center, an historical commission, a Secular Humanism society, a Buddhist temple, or an atheists' club, do not share Section 16C's benefits or occupy the position of privilege Section 16C creates. While all such groups and their leaders may express their views about various nearby liquor establishments and are entitled to have their members' needs and wishes regarding tranquility and temperance weighed by the appropriate public licensing authorities,[14] *not one of them* is given what the city appellants aptly describe as the "right" conferred by Section 16C on places of "divine worship," CLC Br. 39; and *not one of them* receives what the state appellants correctly call the "guaranteed" ability ceded to certain churches and synagogues under Section 16C to veto any given liquor license within a 500-foot radius, State Br. 91, whenever they choose to do so.[15]

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[13] State Br. 2a. Section 16C delegates a veto power over liquor licenses only to those churches and synagogues "dedicated to divine worship." *Id.* Webster's Third New International Dictionary defines the word "divine" as (1) "of or relating to God: proceeding from God"; (2) "of or relating to a god . . . proceeding from a god"; or (3) "devoted or addressed to God." Webster's Third New International Dictionary of the English Language, Unabridged 663 (1981). Any applicable definition of the term "divine worship" would seem to preclude religions that do not teach a belief in the existence of God, including "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others," *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.11 (1961), and it would surely preclude atheism or any other direct denial of God's existence.

[14] Compare p. 38 & n.34, *infra*.

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[15] Thus Section 16C violates the Religion Clauses not only in delegating inherently governmental power to churches as such but also in favoring "those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torasco* v. *Watkins*, 367 U.S. at 495 (citations omitted). For similar reasons, Section 16C also violates the First Amendment's Free Speech Clause inasmuch as it distributes public privileges to groups defined in terms of the ideas they hold or advocate, thus "violat[ing] the fundamental principle that a state regulation of speech should be content-neutral." *Widmar* v. *Vincent*, 102 S.Ct. 269, 278 (1981) (holding unconstitutional a "content-based exclusion of religious speech" from state college facilities). Finally, as the *Widmar* Court also noted, any law such as Section 16C creates an *impermissible entanglement* of church and state insofar as it requires the latter "to determine which words and activities fall within [the term] 'religious worship,'" *id.* 275 n.11 — or, in this case, "divine worship," an even more elusive category to identify without entangling intrusion. *See id.* 274 n.6.

The suggestion of the state appellants that appellee Grendel's, which has undisputedly suffered direct economic injury by virtue of Section 16C's delegation of power to certain church bodies, lacks standing to complain of Section 16C's narrowly content-based designation of the churches and synagogues that may wield a veto, State Br. 76, betrays a basic misunderstanding of the law of standing. *Valley Forge Christian College* v. *Americans United*, 102 S.Ct. 752 (1982), cited in State Br. 77 n.69, is plainly inapposite, since plaintiffs there had "alleged [no] *injury* of *any* kind, economic or otherwise, sufficient to confer standing." 102 S.Ct. at 766 (footnote omitted) (emphasis in original). Moreover, the question in this case is *not* the protected or unprotected status of Grendel's *activities* as compared with those of third parties whose rights Grendel's might wish to champion in an overbreadth attack, *cf. Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); the only question is the validity of Section 16C, which is the cause of Grendel's injury. Here, as in *Cabell* v. *Chavez-Salido*, 102 S.Ct. 735 (1982), appellee does not claim to be "asserting the constitutional rights of others; rather, [it] claim[s] that [Massachusetts] denies [it] the . . . protection of the [First and Fourteenth Amendments, in part] because [Section 16C] is so [under]inclusive that it destroys the State's asserted justification," *id.* 741 n.8, and creates further problems under the First Amendment. It is, of course, settled that there need be no particular "nexus," outside the context of taxpayers' suits, between the injury caused by a challenged state action

Finally, the fact that such a veto can indisputably be withheld by a church or synagogue favored by the would-be licensee with a suitably timed and sufficiently generous contribution obviously *aggravates* the Establishment Clause violation. It does so *first*, by illustrating the "worldly corruptions" to which Roger Williams feared that establishment would lead, *see* CLC Br. 16, and to which it apparently *did* lead, in the very field of liquor licensing, at least in England;[16] and

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and the constitutional norms said to be transgressed by that action. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-81 (1978).

[16] *See* n.11 *supra*. Williams' fears about the "worldly corruptions" and temptations that would engulf the clergy and church if they became too involved in political matters were, if anything, more apt for the eighteenth century than they had been for the seventeenth. By the end of the eighteenth century, many churchmen were using their positions to accumulate great wealth. N. Sykes, Church and State in England in the Eighteenth Century 188 (1934). Over all, the eighteenth-century British clergy were known for their "episcopal opulence and nepotism" and their "secular association . . . with affairs of state." *Id.* 41, 408.

James Madison may have been drawing upon this background in 1785 when he wrote in his "Memorial and Remonstrance Against Religious Assessments" that "[e]xperience shows that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion have resulted in pride and indolence in the Clergy." James Madison, "Memorial and Remonstrance Against Religious Assessments," excerpted in Pfeffer 112-113.

Ultimately, Americans of the eighteenth century came to believe, as Williams had, that churches would be spiritually purer and less politically oppressive if they maintained their separation from the state and from the internal workings of the political process. As James Iredell, a future Justice of this Court, stated in the North Carolina Convention for ratifying the Constitution of 1787 on July 30, 1788, "It would be happy for mankind if religion were permitted to take its own course, and maintain itself by the excellence of its own doctrines. The Divine Author of our religion never wished for support by worldly authority." 4 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 194 (1836). And, as another North Carolina delegate pointed out, the decision that "no one particular religion should be established . . . leaves religion on a solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." *Id.* 200.

second, by creating a mechanism through which religious bodies might clandestinely cajole and even coerce members and non-members alike into filling church coffers as a precondition of engaging in a lawful occupation or making lawful use of their property. Cf. *Thomas* v. *Review Board*, 450 U.S. 707, 717-718 (1981) (indirect pressure to compromise one's religious convictions in order to enjoy public benefit may violate Free Exercise Clause); *Engel* v. *Vitale*, 370 U.S. 421, 430-431 (1962) (indirect coercive pressure to take part in "voluntary" prayer may exacerbate violation of Establishment Clause). In this sense, Section 16C places at the disposal of selected religious institutions an informal but highly effective "taxing" capacity, making the provision objectionable not only as an explicitly religious and indeed discriminatory establishment of *regulatory* power, but also as an unusually direct assault on the familiar Establishment Clause injunction against *exacting tribute* from citizens for theological purposes that may not be their own.[17]

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[17] Use of the taxing or tithing power to support churches has long been seen as a major form of religious establishment. As Justice Black recounted in *Everson*, 330 U.S. at 8-9, the "early settlers" of America had often been punished while they were still in Europe for "failure to pay taxes and tithes to support" established churches; many of them had emigrated to this country partly "to escape the bondage of [these] laws." *See* CLC Br. 14-15. Once in America, these settlers often formed their own established churches, and "dissenters were compelled to pay tithes and taxes to support [these] government-sponsored churches." *Everson*, 330 U.S. at 9-10. *See* CLC Br. 15. By 1727 to 1742, however, Massachusetts had passed a series of laws guaranteeing citizens the right to support only the churches of their choice. Thus, even though it retained a tax to support churches, Massachusetts had mitigated one of the most odious elements of an establishment for the colonists — compulsion to support a church of which one was not a member and whose beliefs one did not share. S. Cobb, The Rise of Religious Liberty in America 234-235 (1902).

This fear of being forced to contribute to a church in which one did not believe was central to the colonists' concerns during the Episcopacy Controversy. *See* n.8 *supra*. The colonists reasoned that "a Bishop must have a

Given the state appellants' concession that what counts is the *nature* of the benefit a challenged measure confers upon religious bodies, State Br. 21, 56, 66, and that, "if the benefit furthers an evil proscribed by the Establishment Clause . . . . [then] the program [itself] violates the Establishment Clause," *id.* 54-55, the argument could well end here. For, as appellee has shown, the practice it challenges is for several reasons an establishment of religion *per se*, not a mere "'foot in the door' or . . . 'nose of the camel in the tent' *leading to* an established church." *Walz* v. *Tax Commission*, 397 U.S. at 678 (emphasis added).

Appellee nonetheless proceeds to show that, *independent* of this fatal establishment clause objection, Section 16C's place-

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See," which would require "the Allotment of a large Tract of Land." Collinson letter, quoted in Bridenbaugh 232-233. In order "[t]o support all this . . . the Laity must be taxed," and eventually, there would be "Laws fram'd by" the Episcopate "in its own Spiritual court." *Id.* The colonists saw in this a horrible fate for those whose forefathers had "fled from their native Land to avoid a Persecution inflicted upon them by this kind of Church Power." *Id.*

It was precisely the use of the state's power to assist churches in collecting tithes that prompted the colonists to accuse Britain of "establishing" the Roman Catholic religion in Quebec, after the passage of the Quebec Act of 1774. *See* p. 10 *supra*. The attempts of the British to tax citizens to support churches to which they did not belong formed a central part of the "establishment of religion" that the First Amendment's Framers sought to prohibit to Congress and that the Fourteenth Amendment thus forebade to the states. *See Abington*, 370 U.S. at 254-59 (Brennan, J., concurring).

Section 16C, in creating a subtler and more sinister form of quasi-taxation for churches, patently violates this aspect of the Establishment Clause by enabling churches to exact sums of money from selected members of the community who have no reason (other than their desire to pursue a lawful occupation) to contribute to those churches and who may not even share those churches' beliefs. Furthermore, Section 16C places the manifestly high-cost machinery of the state — including the liquor licensing boards and the state liquor commission — free of charge at the disposal of each church which raises an objection. At no time in the history of Massachusetts or the United States has an established church received any more.

ment of public power in private hands offends the Due Process Clause of the Fourteenth Amendment (*see* Part II infra), and that no legitimate state interest could serve to justify *either* of Section 16C's departures from the Constitution's norms (*see* Part III *infra*).

II. BY SUBJECTING PERSONAL LIBERTY AND PRIVATE PROPERTY TO THE STANDARDLESS AND UNREVIEWABLE CONTROL OF PRIVATE BODIES DESIGNATED BY THE STATE, SECTION 16C NEGATES ALL THAT IS MEANT BY "DUE PROCESS OF LAW."

Even if the Establishment Clause had never been adopted, the Due Process Clause of the Fourteenth Amendment would provide a separate and sufficient ground for upholding the decision of the court below that Section 16C is unconstitutional.[18]

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[18] There is no merit in the suggestion of the state appellants, State Br. 13 n.11, 23, 87 n.75, that the due process infirmities of Section 16C are not properly before this Court. The claim that Section 16C delegates public power to private bodies in violation of the Due Process Clause has been pressed by Grendel's at every stage of the proceedings below, was fully briefed and argued by both sides in both the district court and the court of appeals, was made a ground of decision by the district court, J.S.A. 122A, and was sympathetically treated in the *en banc* decision below, *id.* 13A-14A & n.5, even though that decision rested on grounds making resolution of the due process claim unnecessary. *Id.* 9A. As in *Dandridge* v. *Williams*, 397 U.S. 471, 476 n.6 (1970), the "issue having been fully argued both here and in the District Court, consideration of the . . . claim [here] is appropriate." *Accord*, *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979). Moreover, in contrast with the two cases cited by the state appellants, State Br. 87 n.75, the instant case involves no unresolved statutory or factual issues which the courts below avoided, or as to which changed circumstances might furnish reasons for a remand. Finally, inasmuch as an appeal under 28 U.S.C. § 1254(2) brings the entire case before this Court, *see* 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 40 (1978), and inasmuch as the prevailing party is "entitled under [this Court's] precedents to urge any grounds which would lend support to the judgment

Whether Grendel's is "entitled" to a liquor license is irrelevant to the due process analysis: even if Grendel's is *not* "entitled" to serve liquor and its patrons are *not* "entitled" to consume it, the state is hardly free to dispense with the dictates of the Fourteenth Amendment in ruling on Grendel's application. *See Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971) (even "police power . . . over intoxicating liquors . . . ." must be exercised in accord with "rule by law," not "rule by fiat");[19] *cf. Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (no entitlement is needed if denial of benefit involves "interference with constitutional rights").[20] And, while

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below," *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977); R. Stern & E. Gressman, Supreme Court Practice 537 (5th ed., 1978), there is no basis whatever for treating the due process claim as not properly here, or for remanding that claim for initial disposition by the court of appeals *en banc*.

[19] "It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power . . . but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion." *Hornsby* v. *Allen*, 326 F.2d 605, 609 (5th Cir., 1964), cited with approval by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 n.9 (1970) (specifically noting that *Hornsby* dealt with liquor licensing). *Accord*, *Mayhue* v. *City of Plantation, Florida*, 375 F.2d 447, 449 (5th Cir. 1967); *Raper* v. *Lucey*, 488 F.2d 748, 752 (1st Cir. 1973) (citing *Hornsby*, and holding driver's license application proceeding to be protected by due process); *Bell* v. *Burson*, 402 U.S. 535, 539 (1971) (license suspension proceeding governed by due process principles).

[20] However narrow might be the category of interests triggering the *procedural* due process right to a trial-type hearing, a much broader category of interests is protected, to a greater or lesser degree, as a matter of *substantive* due process. The claim in this case, while in part an objection to the *process* (or absence thereof) by which Grendel's was denied a valued opportunity, is unmistakably grounded as well in the *substantive right* to be governed by laws, not by standardless, *ad hoc* private will. *See Coates* v. *City of Cincinnati*, 402 U.S. 611, 614-615 (1971) (law forbidding the "annoying" conduct of small sidewalk assemblies is void because it subjects people to policeman's

the state appellants insist on derogating appellee's interests in this case by resurrecting the long-discredited "right/privilege" distinction,[21] both "liberty" and "property" interests *are* in fact at stake here. For, in submitting the appellee's occupational liberty, *see Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 102-03 & n.23 (1976), and the personal liberty of those who might wish to congregate and drink at appellee's restaurant, to the absolute veto of Holy Cross Church, Section 16C denies both of these liberties without due process of law and unconstitutionally deprives the appellee of property by permitting another private body to decide how Grendel's may use its restaurant.[22]

By leaving to the governing body of Holy Cross Church the unilateral authority to decide that granting Grendel's a liquor license is not in the public interest, Section 16C delegates a power that is inherently and indisputably governmental. *See* n.12 *supra*. Both the state appellants, State Br. 18, and the

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whim, not rule of law); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457 (1939) (organized crime law so vague that court's *ad hoc* application of it to defendants subjected them to rule of judge, not that of law).

[21] *See* State Br. 34 n.21, 89 n.77, 101 n.83. Appellants are presumably encouraged to repeat this argument because it found evident favor with two members of the original First Circuit panel. *See* J.S.A. 39A-40A n.4. Since the state appellants cite State Br. 87, 89, 90, 91, 94, 102, 104, and even quote, *id*. 100-101, this opinion so often and largely neglect the *en banc* decision, it might be well to recall that appellants' very presence before this Court is a result of their appeal from that same *en banc* decision — which did, after all, vacate the first panel's judgment and opinion.

[22] The dual nature of Grendel's interest as one in *both* property *and* liberty is suggested by *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). While the majority characterized Mrs. Moore's constitutional right to live with her son and two grandsons (who were cousins) in her home as a liberty interest, *id*. 499-502, Justice Stevens in his concurrence concluded that the city ordinance banning such living arrangements ran afoul of the Constitution by unjustifiably, and without just compensation, restricting the "appellant's right to use her own property as she sees fit." *Id*. 513.

city appellants, CLC Br. 32-33, indeed stress that the balancing of interests required to make such a decision is exclusively a *legislative* function.[23] The delegation of such lawmaking power to politically unaccountable and judicially unreviewable private bodies is exactly analogous to, and indeed even worse than, the standardless delegation condemned by this Court in ***Eubank*** **v.** ***City of Richmond*****, 226 U.S. 137 (1912),** which struck down a local zoning ordinance delegating to the owners of two-thirds of the property abutting an affected street the power to demand a building set-back line. In invalidating that ordinance, this Court stressed the decisive character of the delegation,[24] *cf. New Motor Vehicle Board* v. *Fox*, 439 U.S. 96, 108-109 (1978),[25] and the lack of any standards circumscribing the exercise of the unaccountable power thus delegated.[20] Both those features are present here. And both offer painful reminders of the eighteenth century English experience that was ended by the Beer Act of 1830 — an experience in which the "licensed victualler, alone among tradesmen, [was] 'subjected to the ruinous effects of petty tyranny . . . .'" *Manchester Observer*, Feb. 14, 1818, quoted in Webb, *supra*, at 108-09. Many "vehemently resented the fact that unrepresentative bodies, like the magistrates in Brewster Sessions, could, without appeal, deprive the working-man of his beer, the honest publican of his means of livelihood, and the brewer of his property, out of mere caprice, and not without grave suspicions of political partisanship and even pecuniary corruption." *Id.* 93-94. Such lawless subjugation is the very antithesis of due process of law — particularly where, as here, the power in question is delegated to a *private body* and not, as in *Eubank*, to a *community of neighbors* in which those subject to that power are included and may at least cast a vote. *Cf. City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 678-679 (1976) (rezoning decision properly reserved to all voters of the affected community).

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[23] Section 16C gives churches the inherently governmental role of restricting proposed land uses and preventing proposed uses of a purchased license altogether, *cf. Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 353 (taking private property is a function "traditionally associated with sovereignty"); *see also Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-88 (1952) (disposition of private property is a uniquely legislative function); *id.* 630-31 (Douglas J., concurring) (same).

[24] "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property." *Eubank*, 226 U.S. at 143.

[25] In *New Motor*, the Court upheld the delegation, to private franchisees of new car dealerships, of a right to protest the establishment of new franchises, stressing that the private party's protest operated *not* as a *veto*, but only as a *trigger* which required a public agency to determine, based upon standards written into the law, whether to permit the establishment of the new franchise. *See* 439 U.S. at 107-109. The crucial distinction is that between a legislative scheme in which a private choice merely sets in motion a publicly accountable process of evaluation and decision by an agency of government, as in *New Motor*, and a legislative scheme in which a private choice brings about an injurious outcome for someone without any intervening process of government evaluation, as in Section 16C.

A. *Recasting Section 16C as a Waivable Ban Cannot Save It From Condemnation Under* Eubank.

Appellants seek to avoid the sting of this history and the authority of *Eubank* by conforming Section 16C *post hoc* to a licensing scheme like that upheld by this Court in *Cusack* v. *City of Chicago*, 242 U.S. 526 (1917). In the guise of following this Court's precedents, appellants in truth repudiate them. The challenged ordinance in *Cusack* generally prohibited the construction of billboards in residential areas, but permitted *waiver* of that restriction by the affirmative consent of the owners of the majority of the property fronting on both sides of the affected street. *Cusack*, 242 U.S. at 527-528. The *Cusack* Court distinguished *Eubank* on the explicit ground that the *Cusack* ordinance "delegated" *no* "legislative power" to private owners in permitting them to *waive* or "remove a [billboard] restriction" otherwise *legislatively imposed*. *Id.* 531.[27]

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[20] "The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper[ty] rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously." *Eubank*, 226 U.S. at 143-44.

While the district court carefully reviewed these precedents and correctly concluded that the settled test of a law's constitutionality under the *Eubank-Cusack* line of cases is "whether it incorporates a legislative policy subject to *waiver* or whether it actually licenses private persons to *impose* policy on the public," J.S.A. 113A (emphasis in original), the state appellants' brief persists in deliberately confusing a privately *waivable ban* enacted by a public body with a private *veto power* delegated by public law.[28] In *Eubank* the ordinance empowered property owners to *compel* a public body to *impose* a restriction; in *Cusack* the prohibition was established by law although the law's "reference to [the concerned] neighborhood," 242 U.S. at 530, enabled affected property owners to *waive* its application. In the instant case, like *Eubank* but unlike *Cusack*, Section 16C enacts *no general prohibition* on locating liquor licenses near churches or schools, but merely allows each such private institution to *veto* any *particular* application for such a license by a business situated anywhere within the nearly million-square-foot area surrounding the institution. The suggestion, *see* State Br. 93-94, that Section 16C resembles the *Cusack* ordinance rather than the *Eubank* provision is thus palpably frivolous and was properly rejected by the district court. J.S.A. 118A-122A. To accept that suggestion here would obliterate the very distinction that this Court treated as pivotal in *Cusack*. 242 U.S. at 530-31.[29]

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[27] The vitality of this distinction for due process purposes was assumed by this Court in *City of Eastlake*, *supra*, 426 U.S. at 677-78 n.12. Subsequent to *Cusack*, in *Washington ex. rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), this Court invalidated a scheme which operated like the one upheld in *Cusack*. *See also New Motor*, *supra*, 439 U.S. at 108-109.

[28] *See* State Br. 18, 20, 23, 59, 90, 91. The distinction between these two categories may, of course, be immaterial to the establishment clause analysis of Part I *supra*.

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[29] The state appellants attempt to show by a review of Section 16C's legislative history that only the *form* of implementation has changed while the legislative *policy* has remained constant. State Br. 37-38, 102-104. But each of the changes in the law between 1954 and 1970, the date of the last relevant amendment, has gone distinctly beyond the merely technical. The texts of the various versions are set out in the Statutory Appendix to State Br. at 2a-9a.

In 1954, as originally enacted, Section 16C flatly forbade the licensing of liquor outlets within 500 feet of a church or school. In 1968, the law was changed to permit licenses within the 500-foot zone of a *church* if the church's governing body consented in writing. It is important to note that, while the 1968 form of the statute is correctly set out in the State's Statutory Appendix at 7a-8a (this version corresponds exactly with that contained in the official State House Archives in Boston), the state appellants flatly misquote the statute at page 37 of their brief by saying that *both* schools and churches could waive the ban under the law as amended in 1968. (The Supreme Judicial Court of Massachusetts made the same slip in *Arno* v. *Alcoholic Beverages Control Commission*, J.S.A. 172A, on which the state appellants frequently rely in their brief. *See, e.g.*, State Br. 34, 36, 38, 90.) In 1969, State Representative Ralph Sirianni introduced a bill (never enacted) that would have left intact the ban subject to waiver by churches, but would have put in place a permission subject to veto by schools. Proposed 1970 Mass. Acts & Statutes c. 192 (in State House Archives). In 1970, the Sirianni bill was amended to the law's present form, which permits licensing of liquor outlets within 500 feet of schools *and* churches absent the *affirmative objection* of the school's or church's governing body.

The upshot of this history is that the legislative policy has *not* remained constant as appellants maintain. Instead, the state's policy has shifted

B. *Treating Section 16C's Veto Power as Subject to Public Scrutiny and Control Likewise Cannot Save It From* Eubank.

The state appellants attempt to dismiss the potential for abuse inherent in Section 16C by assuring this Court that it need not fear that a church will ever veto an application for invidious reasons inasmuch as the Cambridge License Com-

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gradually from an *absolute ban*, to a ban subject to *church waiver*, to a policy of *legislative neutrality*, *see* district court opinion, J.S.A. 114A-115A, subject to an *absolute veto* by either schools *or* churches.

Appellants' attempt to avoid the thrust of *Eubank* by arguing that the legislative *purpose* of Section 16C remained the same from version to version is thus not only irrelevant (what counts in this area of the law is *what* the law does, not *why*), but also utterly implausible. Moreover, it flies in the face of *Washington ex rel. Seattle Title Trust Co., supra*. There, this Court plainly held that a "grant of permission for [a] use, although [literally framed as a prohibition] . . . subject to . . . consents, shows that the legislative body found [such use to be] in harmony with the public interest." *Id.* 121. Yet the state appellants insist on arguing, as did the vacated original First Circuit majority opinion, J.S.A. 55A-56A, that solely because a "grant of permission" subject to veto has in a *previous* version been framed as a prohibition subject to waiver — a circumstance at best bringing the case marginally closer to *Roberge* on the spectrum from legislative resolution to legislative abdication — the resulting scheme may be regarded as one in which the legislative body has found the use in question to be contrary to the public interest. State Br. 90-91, 103-104. Such convoluted word-play by appellants cannot change the fact that the *current* form of Section 16C delegates unguided discretion to churches.

Unlike the situation in *New Motor*, *supra*, the veto of Grendel's application for a liquor license by Father Luke and the Holy Cross Church was not merely the *initiation of a government decision process;* it was in itself *the decision*. The fact of the delegation of legislative authority cannot be changed by noting that, more than a decade ago, Section 16C did *not* provide Father Luke with veto power. Nor is that statute saved by treating as dispositive the fact that the veto power it *did* provide as of 1970 was delegated to private individuals by a well-considered, prior legislative choice. For such a legislative judgment is not the finale but the overture of any consideration of the resulting delegation's validity.

mission may be able to "reject or ignore any objection under Section 16C which was made for discriminatory or otherwise illegal reasons." State Br. 85 n.74. That is simply false. As the state appellants concede six pages later, the official objection of a church or school has a "*guaranteed* effect." *Id.* 91 (emphasis added). The Cambridge License Commission likewise concedes that churches and schools have the "*right* . . . to *prevent* the issuance of liquor licenses within 500 feet." CLC Br. 39 (emphasis added). As these terms suggest, there is *no* review of *any* kind to assess the objecting institution's reasons for casting a veto. The church elders simply mail in their objection; the result is then assured. Indeed, the state appellants argue that it is just this "narrow relationship" which avoids excessive entanglement between church and state. State Br. 22. They note in their First Amendment argument the minimal contact between the clergy and the licensing commission which results from this "self-operating procedure," *id.* 83, and, on the very same page where this Court is told not to worry about possible abuse, the state appellants praise the *total absence* of "administrative assessment of a church's concerns." *Id.* 85. *See also* n.2 *supra* (state appellants, both directly and through Attorney General, respond to Grendel's interrogatories by saying that church governing body need not state "any reason" for its veto).

The Supreme Judicial Court in *Arno*, *supra*, J.S.A. 161A, construed Section 16C as a "delegation . . . of a veto power," *id.* 175A, which the church may exercise "in its discretion," *id.* 179A, subject to a hearing only with respect to such relatively mechanical questions "as whether the objecting institution qualifies as a 'church' for the purpose of the statute, whether it is within the statutorily protected zone of 500 feet, and whether the written objection was duly authorized by the appropriate 'governing body' of the church." *Id.* 179A-180A. A *virtue* of this arrangement, according to the state appellants, is that the protected church or school, "as the party most knowledgeable about its own exposure to injury," is allowed to weigh for itself the advantages and disadvantages of a new liquor outlet nearby. State Br. 39. It is thus impossible to escape the conclusion of the district court that, "[s]imply put, under Section 16C a church or school may exercise its discretion to object for good reason, bad reason, or no reason at all." J.S.A. 116A n.8. Given what the ABCC itself called this "absolute veto" power, J.A. 25, wielded on the basis of undisclosed reasons by politically unaccountable and judicially unreviewable religious institutions, it is an utter mystery how the state appellants manage to conclude that an objection to a license application under Section 16C "is not the imposition of a private policy, but the implementation of a public policy enacted *and supervised* by the elected Legislature." State Br. 91 (emphasis added).[30]

C. Eubank *Cannot Be Distinguished on "the Equities", for Equitable Considerations Especially Condemn Section 16C.*

In one final effort to avoid the authority of *Eubank*, the state appellants argue that this case is distinguishable on "the equities inherent in [its] underlying facts." State Br. 95. Any such comparison with the statute challenged in this case, however, shows that Section 16C, not the ordinance in *Eubank*, creates by far the greater risk of inequitable results.

One of the vices noted by this Court in its review of the *Eubank* ordinance was its lack of uniformity: one side of a street might have a set-back line while the other did not; houses might be staggered back and forth on successive blocks; set-back lines might be set at greatly different distances. *Eubank*, 226 U.S. at 144. Yet, for all that, the *Eubank* ordinance at least had the virtue of being consistent for the group of property owners who compelled a set-back line's establishment and were thereby reciprocally bound, along with their neighbors, by the results of their action. For whenever the owners of two-thirds of the relevant property decided to impose a set-back, it was a single line, set by a public body and applicable uniformly to themselves and their neighbors. They could not establish one line for themselves and another for those they did not like, or one line for their friends and another for those who refused to make appropriate "contributions."

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[30] Indeed, the concession of all appellants on the antitrust issue, *see* n.4 *supra*, itself shows that the private institutions exercising anti-competitively the power delegated by Section 16C are *not* acting in accord with legislatively dictated policy but are imposing a policy arrived at privately.

Section 16C is in this sense far *more* offensive, because it allows a church to target and veto particular license applicants on an *ad hoc*, non-uniform, and wholly non-reciprocal basis. It bears repeating that, in its answers to plaintiff's interrogatories, the Alcoholic Beverage Control Commission of Massachusetts admitted that Section 16C, as applied by the ABCC, "does not require the governing body of a church to state any reason for its objection to the issuance of a license." J.A. 35, 37-38. The ABCC is thus unable to dispute that a church might, without any fuss, deny a license to any establishment within 500 feet solely on the basis of the applicant's race, sex, religion, national origin, political affiliation, or shoe size. The elders of Holy Cross Church are free to wield their veto power so as to extort contributions to the church, visit punishment upon their personal enemies, or stultify the local commercial competitors of their parishioners who are in the restaurant and liquor business. A more comprehensive list of motives offensive both to the Bill of Rights and to common decency — and yet unreviewable in any particular case — would be hard to imagine.[31] No state interest could possibly justify this outrageous delegation of unbridled governmental power — seemingly the worst such delegation ever to reach this Court.[32]

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[31] This is not a case where an otherwise valid law is being challenged because its "legitimate objectives . . . may be subverted by conscious design or lax enforcement," *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971), but one in which the evils derive from the statute's *inherent* and *inescapable* effects. Indeed, these very evils were exposed in 1891 by Louis D. Brandeis, appearing before the Massachusetts Legislature to testify against a law similar to Section 16C:

> You cannot with yard stick decide whether the location of the saloon would be an injury. It may or may not be . . . . But if you give power to every person within twenty five feet of every proposed liquor store to determine that question for himself, you put into his hands a great power which he is likely to abuse. It needs no evidence (although much evidence was introduced), to prove that such power will often be abused. To give a neighboring real estate owner an uncontrollable right to object may, under circumstances, be giving him the whip hand over the applicant for a license; and it will depend entirely upon the character of him who holds that whip, whether this instrument of castigation be used for the owner's protection or be applied in securing unjust booty . . . [W]hen you give the absolute right to object, you have put into the hands of men an irresistible weapon.

Argument of Louis D. Brandeis before the Joint Committee on Liquor Law of the Massachusetts Legislature, Feb. 27, 1891, reprinted in *1 Hearings on the Nomination of Louis D. Brandeis before a Subcommittee of the Senate Committee on the Judiciary* 1057, 1065 (1916).

[32] *See* Part III *infra*. In the course of its establishment clause argument, the Cambridge License Commission actually suggests that Section 16C's delegation of veto power to churches is justifiable as a way of keeping provoked parishioners from physically retaliating against nearby liquor licensees. CLC Br. 36. This is tantamount to saying that, in order to prevent angry church elders from taking the law into their own hands, we should *give* it to them. If the government were to abandon its monopoly over coercive force, *see Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 345, 346-47 (1827) (Marshall, C.J., dissenting), every time some group threatened to take to the streets, legislative delegations of authority would operate on a principle little nobler than that of a protection racket. To accept the License Com-

As this Court recognized nearly a century ago,

> the very idea that one . . . may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another [is] intolerable in any country where freedom prevails.

Yick Wo v. *Hopkins*, 118 U.S. 356, 370 (1886).

III. NO LEGITIMATE STATE INTEREST CAN JUSTIFY SECTION 16C'S ESTABLISHMENT OF SELECTED PRIVATE INSTITUTIONS — THOSE "DEDICATED TO DIVINE WORSHIP" — AS REGULATORY ARMS OF THE STATE.

A. *Neither the Goal of Controlling Liquor Traffic, Nor That of Regulating Land Use to Preserve Tranquility, Nor That of Accommodating Religious Needs With Minimum Entanglement, Can Support Section 16C's Delegation of Coercive Power to Designated Religious Bodies.*

If this Court were ever to sustain a delegation of power as sweeping as Section 16C's, or a grant of privileged status as

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mission's quite astounding rationale for Section 16C's delegation would be to turn back the clock to those primordial times — before the state arose out of the morass of private protection agencies, *see* R. Nozick, Anarchy, State and Utopia 16-17, 88-89 (1974) — when there was "neither peace, nor rest nor a moment's safety" because men "knew no law but the law of club and fang." J. London, The Call of The Wild 39 (1929). Precisely because dispute resolution in our society is subject to the rule of law, not "the will of strategically placed individuals", *Boddie* v. *Connecticut*, 401 U.S. 371, 374-75 (1971), we no longer live in a "state of nature." But were the government to capitulate to the spectre of marauding mobs of angry churchmen or their followers, we would once again inhabit a world where life would indeed be "nasty, brutish and short," T. Hobbes, Leviathan 185 (1651) (Penguin ed. 1978), and the "law of the world . . . a winter law, and casual." J. Gardner, Grendel 115 (1971).

narrowly and unequally confined as Section 16C's to specific religious bodies, this would be the worst imaginable case in which to do so. For any legitimate secular goal to be served by preserving tranquility around institutions needing such protection (something Section 16C does not really do at all) could be served far better — without either delegating power to private parties *or* singling out particular religious bodies as favorites of the state, and certainly without hostility to religion, *contra* State Br. 71 n.64 — simply by directing the responsible public authorities to give due weight to the interests of each such institution, whether *sua sponte* or at the institution's behest, in appropriate proceedings, *cf. New Motor Vehicle Board*, 439 U.S. at 109[33] — as Massachusetts already *does*, independent of Section 16C. *See* State Br. 36 n.24.

Only two arguments have been advanced against the adequacy of this obvious and altogether traditional solution. *First*, it is said that letting churches and synagogues submit their objections to public licensing authorities on the same basis as everyone else would require unseemly governmental inquiry into these groups' religious concerns and practices, State Br. 22, 83, causing a degree of entanglement between church and state that delegating an absolute veto power can avoid. *Id.* 85. *Second*, it is said that only conferring an unquestioned "*right* . . . to prevent the issuance of liquor licenses within 500 feet," CLC Br. 39, could adequately avoid "actions so inherently inflammatory" — the city appellants are describing the act of having a glass of chablis with one's lunch within 500 feet of a church — "as to provoke the average person to retaliate, and, in protecting his church or his child's school, cause a breach of the peace of the commonwealth." *Id.* 36.

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[33] As Justice Brandeis observed when he testified before the Massachusetts Legislature against a provision similar to Section 16C, *see* n.31 *supra*, it is surely a "fallac[y]" to assume "[t]hat the Licensing Boards are so feeble or corrupt that they cannot be entrusted with the duty of determining whether the establishment of such a liquor store would be a nuisance in the particular case." *Id.*

Unless such claims are being made in jest, the premise they reflect is a profoundly dangerous one. Not even Section 16C honors a supposed wish on the part of school or church leaders always to have their way, no questions asked, on threat of taking the law into their own hands. *See* n.32 *supra*. Even with Section 16C in force, church leaders who object to liquor being served or sold *over* 500 feet away, for example, must submit their views to the same governmental process as that available to all others in the community. *See* State Br. 36 n.24.[34] And if the state *were* to capitulate to such supposed desires for total disentanglement from others or total power over others, it is hard to see why such appeasement should start — or stop — with schools and churches. Are we to suppose that church leaders are more likely than homeowners to find unbearable the prospect of nearby drinking or the burdens of submitting their objections peacefully to public scrutiny? To state the claim is to explode it: *no* group in a democratic republic may commandeer "the machinery of the State to practice its beliefs," *Abington*, 374 U.S. at 226, by *coercing* rather than *persuading* the people and their representatives to accede to the group's will. To the degree that Section 16C rests on a contrary view, it is hopelessly incompatible with the form of government created by our Constitution.

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[34] And church leaders or members who have misgivings about a liquor license *within* the 500-foot circle, but who are reluctant to exercise a veto, *cf.* J.S.A. 57A n.7, are likewise relegated to the same process as everyone else. State Br. 84 n.72. At all events, Section 16C itself plainly *creates* more entanglement problems than it *solves*. *See* n.15 *supra*.

B. *In Reserving Certain Spheres of Sovereign Power to the States, the Tenth and Twenty-first Amendments Free Neither the Exercise Nor the Delegation of Such Power From the Restraints of the First and Fourteenth Amendments.*

Appellants' reliance on the Tenth and Twenty-first Amendments to add weight to the state interests supposedly served by Section 16C, *see* State Br. 25, 26-27; CLC Br. 11, 13, 38, is badly misplaced. The Tenth and Twenty-first Amendments reserve power to the *states* — not to *churches*. Moreover, to say that state power to ban a thing *completely* "necessarily" entails the power to ban it *in part*, State Br. 38-40, is to twist both law and logic by overlooking the basic proposition that a state's power to ban *any* activity, whether in whole *or* in part, remains fully subject to the strictures of the First and Fourteenth Amendments regardless of the affirmative source of *whatever* power the state purports to exercise. *See Craig* v. *Boren*, 429 U.S. 190, 206-209 (1976) (state law setting lower drinking age for females than for males violates equal protection notwithstanding Twenty-first Amendment); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (state power to decide who may consume alcoholic beverages is subject to due process requirements); *cf. California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) (Twenty-first Amendment did not "repeal" even the Commerce Clause and must be reconciled with its negative implications).

Once the matter is seen in this light — with recognition that a supposed state power to ignore the Bill of Rights and the Fourteenth Amendment is in no sense a "lesser" included power — it should not seem at all surprising that these strictures often prevent the state from proscribing unevenly, and especially through too open-ended a delegation of authority to private parties, conduct that the state itself might constitutionally have forbidden altogether. A state that would be free completely to ban alcohol obviously could not, despite the Tenth and Twenty-first Amendments, limit social drinking to white males, to those who will forego political criticism while in a bar, to individuals approved as devout by designated church authorities, or to persons willing to pay sufficient tithes to such authorities. So too the state's ability to zone liquor entirely out of certain areas manifestly implies no subsumed ability *to confer upon churches or other private bodies* an unbridled power to decide *which* nearby establishments may sell liquor or serve it with the meals they sell, and which may not. In no sense is the state's ability to take this latter step a "lesser" included power — neither in terms of its economic impact upon the affected establishments as they compete with one another for patrons; nor in terms of the difference between dependence upon an agency legally and politically accountable for its acts and dependence upon the private will of another; nor in terms of the pressure to offer "donations" to a church or other private body as the price of making full use of one's liberty and property.[35]

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[35] This analysis plainly does not conflict with this Court's decisions sustaining "the power of a State to prohibit topless dancing in an establishment licensed by the State to serve liquor." *New York State Liquor Authority* v. *Bellanca*, 101 S.Ct. 2599, 2600 (1981) (*per curiam*); *California* v. *LaRue*, 409 U.S. 109 (1972). For, even assuming that the state's "power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," *Bellanca*, 101 S.Ct. at 2601 (*but see id.* at 2602 & n.3 (Stevens, J., dissenting)), that conclusion reflects two special considerations, both absent here: *first*, that unique problems are "associated with mixing alcohol and nude dancing," 101 S.Ct. at 2601; and *second*, that zoning erotic activities away from places where alcohol is consumed may indeed be a "lesser" exercise of governmental power than banning either component of the mix — suggestive nudity *or* liquor — altogether. *Cf. Schad* v. *Borough of Mount Ephraim*, 101 S.Ct. 2176 (1981) (striking down community-wide ban on live entertainment); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding municipal ordinance requiring at least 1,000 feet between adult book stores, adult movie theaters, liquor stores, pool halls, and the like). *Delegating* to churches the

It follows that neither the Tenth Amendment nor the Twenty-first does anything to alter the proper decision in this case, and that the court of appeals' holding to that effect, J.S.A. 24A n.11, was entirely correct.

Conclusion.

The supreme importance of preserving the opportunity of all religious bodies and believers to invoke the Bill of Rights as a *shield* whether they retreat into private worship or venture into open public debate[36] must not obscure the equal significance of resisting all measures that would put into the hands of selected religious groups the *sword* of official public power — the power to make legally binding decisions about the liberty and property of others.

Far from advancing the ultimate cause of religion in a pluralistic society, any such delegation of civil authority to ecclesiastical officials would inevitably endanger the spiritual as well as the secular sphere. For legally sanctioned power in our system eventually brings politically imposed responsibility in its wake.[37] Unless utter despotism is to prevail, churches that

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power to zone the sale of liquor out of the business district such churches occupy — and especially the power to do so *selectively*, banning whichever nearby liquor establishments the churches in question decide to veto — differs in both these crucial dimensions from the legislative actions upheld in *Bellanca* and *LaRue*.

[36] *See McDaniel* v. *Paty*, 435 U.S. 618 (1978) (ministers cannot be excluded from legislative office); *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970) (religious bodies have same right as secular bodies to "take strong positions on public issues") (dictum).

[37] *See, e.g.*, the 1631 statute quoted in W. Hening, 1 Statutes at Large of Virginia 158 (1823):

> Mynisters shall not give themselves to excesse in drinkinge, or riott, spendinge their tyme idellye by day or night, playinge at dice, cards,

begin as unaccountable enclaves of coercion backed by law — the sort of coercion sanctioned on a discriminatory basis by Section 16C — will end as the servants of a theocratic state, themselves the subjects of the coercive power they undertake to wield. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943). The religious establishment created by Section 16C, both because of what it *does* and because of what laws like it *threaten* to do, should be struck down by this Court, and the judgment of the court of appeals should accordingly be affirmed.

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or any other unlawful game; but at all tymes convenient they shall heare or reade somewhat of the holy scriptures, or shall occupie themselves with some other honest study or exercise, alwayes doinge the thinges which shall apperteyne to honesty, and endeavour to profitt the church of God, alwayes haveinge in mynd that they ought to excell all others in puritie of life, and should be examples to the people to live well and christianlie."

Appellant's Reply Brief

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No. 81-878
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS and
SUSAN R. BENDER as they are the members
of the MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, and the CAMBRIDGE
LICENSE COMMISSION,

Appellants,

v.

GRENDEL'S DEN, INC.,

Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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No. 81-878
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, LOUIS A. CASSIS and
SUSAN R. BENDER as they are the members
of the MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, and the CAMBRIDGE
LICENSE COMMISSION,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

Pursuant to Rules 34.4 and 35.3 of the Rules of this Court, the Appellants, the Massachusetts Alcoholic Beverages Control Commission (the Commission) and the Cambridge License Commission (CLC), file this brief in reply to the brief filed by the Appellee, Grendel's Den, Inc. (Grendel's).

I. GRENDEL'S ESTABLISHMENT CLAUSE ARGUMENT DOES NOT SUPPORT THE EN BANC PANEL'S INVALIDATION OF MASS. GEN. LAWS c. 138, §16C.

A. Grendel's Establishment Clause Argument Does Not Support The Judgment Below.

Grendel's brief demonstrates that its Establishment Clause claim remains, in the words of the district court, a mere "spinoff" of its due process theory. Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 768 (D. Mass. 1980), J.S.A. 103A. As a result, Grendel's avoids any discussion in its brief of the traditional Establishment Clause principles of Lemon v. Kurtzman, 403 U.S. 602 (1971). Instead, it presents its Establishment Clause argument in terms of due process and delegation. See Grendel's Brief at 8-22. In this regard, Grendel's obscures the First Circuit's true holding by suggesting that the Court based its decision on Grendel's delegation claim. The First Circuit did not rely on that claim. The Court's opinion rested squarely on traditional Establishment Clause principles, Grendel's II, 662 F. 2d at 106-107, J.S.A. 17A-23A, and it specifically declined to address Grendel's due process assertions. See Grendel's II, 662 F. 2d at 107 n. 11, J.S.A. 24A, n. 11. By its attempt to buttress the First Circuit's decision through an infusion of due process principles, Grendel's concedes the weakness of the very Establishment Clause argument on which it prevailed in the First Circuit.

As explained in the Commission's Brief (Commission's Brief at 46-86), the First Circuit's opinion cannot be harmonized with the Establishment Clause opinions of this Court since §16C does not advance any evil addressed by the Establishment Clause.[1]

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[1] Contrary to Grendel's assertions, the "crucial" concern of the colonists was not simply that "government power . . . would be placed at the church's service and command." Grendel's Brief at 10. Rather the founding fathers primarily focused upon precisely how that power would be used. The overwhelming historical evidence clearly shows that the power which the colonists feared was, first, the power to require attendance at church services, and, second, the even more dangerous power to tax for the support of the church. Levy, "No Establishment of Religion: The Original Understanding" in Judgments: Essays on American Constitutional History, 191 (1972). Section 16C does not give churches either of these powers and therefore is clearly outside the founding fathers' core concept of the Establishment Clause. See CLC's Brief at 26-27.

Moreover, section 16C does not delegate any lawmaking authority to churches. See infra at 26-39. Nor does §16C substitute, as the amici claim, "sectarian for secular policy standards." Amici Brief at 22.[2] A church's objection under §16C is not the substitution for, but rather the effectuation of, the Legislature's judgment that existing churches and schools warrant protection from the noise and activities which commonly accompany liquor distribution. Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 88, 384 N.E. 2d 1223, 1228 (1979). See infra at 34-39.

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[2] The American Civil Liberties Union and the Civil Liberties Union of Massachusetts have filed a joint brief in support of Grendel's position. The Commission shall refer to that brief as Amici Brief at ___.

Despite Grendel's recharacterization of the issue in due process terms, the First Circuit's decision must be measured, at least in the first instance, by the principles which it purported to apply. By those standards, the First Circuit's rationale fails to accord due respect to the state interests underlying zoning legislation. Its rationale precludes states from extending any zoning protection to religious institutions. The Establishment Clause does not require states to ignore the environmental needs of its religious institutions: therefore, the *en banc* panel's decision should be reversed.

B. Section 16C Cannot Be Invalidated "On Its Face" By The Mere Allegation That Churches Might Abuse Their Statutory Option.

Grendel's, at this time, raises only a facial challenge to the validity of §16C. Its "as applied" claims remain lodged in the District Court, ready for further litigation if the en banc panel's decision is reversed. Grendel's Brief at 4 n. 4. Notwithstanding the posture of this case, Grendel's presents the Court with substantial factual material which has no evidentiary support[3] or which is contradicted by a fair reading of the record[4/] and urges the Court

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[3] For example, Grendel's insists that the sidewalk route from its entrance to the front entrance of Holy Cross is 400 feet. Grendel's Brief at 3 n. 3. There is, however, no support for this assertion in the present evidentiary record. Moreover, this allegation is actually misleading. A patron leaving Grendel's and heading for Mt. Auburn Street would

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more likely use the public walkway which runs in front of Grendel's and alongside the church. See the map attached to CLC's brief. Using that route, the distance from entrance to entrance is a quarter of the 400 feet which Grendel's alleges. Similarly, the portion of Grendel's building which abuts the church is far from solid and contains doors and windows. Indeed, the ten-foot gap between the two buildings can only be termed "illusory" (Grendel's Brief at 3 n. 3) by virtue of the fact that the intervening area is occupied by Grendel's trash cans and dumpster.

[4/] For example, Casa Mexico is not, as Grendel's claims, across the street from the church. Grendel's Brief at 3 n. 3. It fronts on a side street and is not even visible from the church's side entrance. See J.A. at 72; see also the map attached to the CLC's brief. Grendel's also implies that the church objected to the Swiss Alps' license, but not the Harvard Provision Company's license. Grendel's Brief at 3 n. 3. The factual record shows, however, that those licenses were approved in 1960 and 1963 respectively, J.A. at 72. At that time, §16C totally prohibited liquor licenses from being issued within 500 feet of a

(footnote continued)

to invalidate §16C on the ground that it has "a potential for abuse." Grendel's Brief at 29-33.[5/]

Section 16C constitutes a general legislative rule of statewide application. In order to prevail on a facial challenge to such a statute, a plaintiff

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(footnote continued)

church or school. See Statutory Appendix in Commission's brief at 6A. One would logically infer that either the church was not in existence at that time or those liquor licenses were transferred from a distance closer to the church than their present location. In any case, the church could not have used §16C, as Grendel's claims, to object to the issuance of those liquor licenses.

[5/] The amici also urge the Court to follow this course. See Amici Brief at 18-27. The original panel of the First Circuit, unlike the district court, correctly refused to invalidate the statute on such hypothetical grounds. See Grendel's I, 662 F. 2d at 98-99; J.S.A. 80A-86A. The original panel also addressed many of the same arguments which Grendel's presents here. Id.

must show that the law is "invalid in toto -- and therefore incapable of any valid application." Village of Hoffman Estates v. Flipside, Hoffman Est., 102 S. Ct. 1186, 1191 n. 5 (1982), quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974).[6/] Because Grendel's chose to proceed solely on its facial challenge, its hypothetical examples of abuse

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[6/] By contrast, a judgment of "as applied" unconstitutionality merely requires a conclusion that a statute has miscarried in the circumstances at hand. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). Section 16C's general proscription applies not only to the congested area of Harvard Square but also to the more rural areas within Massachusetts. Thus the fact that there are presently 26 other liquor licenses within the vicinity of Holy Cross is irrelevant. Legislative rules of general application are not judged by "atypical examples" and do not lose their facial validity simply because they may "produce seemingly arbitrary consequences in some individual cases." Califano v. Jobst, 434 U.S. 47, 53-55 (1977).

do not provide an adequate ground upon which to invalidate §16C.[7]

The possibility always exists that a legislative program can be used in a manner contrary to its legislative intent and design. The Legislature is, however, entitled to presume that individuals will act in good faith. Grendel's I, 662 F.2d at 99, J.S.A. 83. See Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319, 327 (1916)("The law presumes that every man, in his private and official character, does his duty, until the contrary is proved. . . ."). Furthermore, the mere possibility of abuse is not sufficient to overcome the facial validity of a legislative enactment. See United States v. Raines, 362 U.S. 17, 21-22 (1960). Where a statute is constitutional on its face but susceptible to abuse, the Court will sustain the provision and leave hypothetical misapplications to proof in the appropriate case. Id. Contrary to the assertions of the amici (Amici Brief at 18-21), this deference to legislative judgments applies with full vigor in the Establishment Clause context. Tilton v. Richardson, 403 U.S. 672, 679 (1971); see also Widmar v. Vincent, 102 S. Ct. 269, 277 (1982) (no Establishment Clause violation in the absence of "empirical evidence"). Thus, Grendel's argument that §16C may be susceptible to abuse cannot overcome the facial validity of §16C.[8/]

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[7] The Commission has consistently maintained that some type of state remedy is available to protect license applicants from the illegal motives of a school or church official. Whether the Commission itself has such power is an unanswered question of state law since no state case has addressed the issue. The amici suggest that such supervision would create excessive entanglement. Amici Brief at 30. This Court, however, has never allowed a person's religious status to immunize his fraudulent, collusive or illegal behavior from the review of civil or criminal authorities. See United States v. Ballard, 322 U.S. 78 (1944) (fraudulent use of the mail); United States v. Reynolds, 98 U.S. 145 (1899)(polygamy). Cf. Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church, 393 U.S. 440, 447 (1969). In any event, these questions do not arise in this case since there is no evidence that Holy Cross objected for a reason other than its expressed desire to protect itself from further "noise, dirt and abuse." J.A. at 53.

[8/] The amici also raise the possibility that a church may file an objection because of its religious convictions. The amici assert that such a possibility renders §16C unconstitutional. Legislative judgments which have valid secular goals are not, however, unconstitutional because they "merely happen . . . to coincide or harmonize with the tenets of some or all religions." McGowan v. Maryland, 366 U.S. 420, 442 (1961).

(footnote continued)

C. Grendel's Lacks Standing To Press The Argument That Section 16C Discriminates Between Religions. In Any Case, Section 16C May Be Construed To Satisfy Establishment Clause Standards.

Although it never raised the issue in the lower courts,[9] Grendel's now claims that §16C discriminates between theistic and non-theistic religions.

(footnote continued)

Section 16C was not designed to promote the beliefs of any particular religion. It was instead designed to separate what the Legislature reasonably viewed as incompatible land uses. Similar statutes have been unanimously upheld despite the fact that such prohibitions on the sale of liquor may coincide with the religious beliefs of some sects. Commission's Brief at 49 n. 36. Moreover, even if §16C is viewed as benefiting some religious groups in this regard, it goes no "further than to provide surroundings accommodating to the free exercise of religion." Grendel's I, 662 F. 2d at 96, J.S.A. 69A-70A.

[9] See Grendel's I, 662 F. 2d at 98, J.S.A. 77A.

Grendel's Brief at 16-19.[10]

Grendel's rests its claim on §16C's definition of a church as "a building dedicated to divine worship and in regular use for that purpose . . . ." Focusing upon the word "divine," Grendel's argues that §16C distributes its benefits on the basis of a religious group's belief in God, so that §16C unconstitutionally discriminates among religions. Grendel's argument ignores §16C's central purpose, the regulation of land use.

As a threshold matter, Grendel's lacks standing to raise this claim. _See_ _McGowan_ v. _Maryland_, 366 U.S. 420, 429-430 (1961). Grendel's may not challenge §16C on the ground that it "may conceivably be applied unconstitutionally to others in situations not before the Court." New York v. Ferber, 102 S. Ct. 3348, 3360 (1982). Grendel's does not claim that §16C discriminates against it on the basis of the religious beliefs of its proprietors.[11] Grendel's argument regarding underinclusiveness is based on the rights and interests of institutions which might fairly be characterized as similarly situated to churches and schools. No such party is before the Court. Moreover, the evidence before the Court does not show a common interest shared by Grendel's and those persons that it seeks to represent.[12] Finally, there is no practical impediment to the presentation of these claims by the third parties themselves. Compare Eisenstadt v. Baird, 405 U.S. 438 (1972). Under these circumstances, Grendel's cannot overcome the prudential limitations on constitutional adjudication: therefore, it lacks standing to raise this claim of underinclusiveness.

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[10] The amici also make a similar argument. Amici Brief at 24-27.

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[11] There is also no question concerning Holy Cross's status as a church. Of course, since Holy Cross qualifies as a church, a court order extending §16C to "all similarly situated institutions" would not help Grendel's cause. The church's objection would still preclude the Commission from issuing a liquor license to Grendel's. For this reason also, Grendel's lacks the necessary standing. See Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (standing denied where it was likely that the alleged injury would not be addressed by resolution of the claim).

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[12] In fact, those interests would appear to conflict, since institutions which are similarly situated in regard to churches and schools would not be seeking the invalidation of §16C, but only its extension to them.

In any event, section 16C may be construed so as to preserve its constitutionality. Courts have often been required to determine which structures or groups qualify as a church in a particular statutory context.[13/] The statutory use of religious language has not

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[13/] See, e.g., Taft v. New York State Liquor Authority, 84 A. D. 623, 444 N.Y. S. 2d 259, 260 (N. Y. App. Div. 1981) (whether building qualified as a church under law prohibiting liquor licenses within 200 feet of a church). Staiger v. Liquor Control Commission, 336 Mich. 630, 59 N.W. 2d 26, 27 (1953) (same). See also N. Williams, American Planning Law: Land Use and the Police Power, §77.17 (1975) The question whether the benefits of section 16C are available only to theistic sects was neither raised in Arno nor addressed by the Massachusetts Supreme Judicial Court. See Arno, 384 N.E. 1228 n.16; J.S.A. 180A n. 16. No state court decision has addressed the issue.

typically been viewed as a ground for invalidation. Instead, courts generally will interpret even seemingly theistic language in non-theistic terms in order to avoid inter-denominational discrimination.[14/]

In light of such cases, §16C cannot be legitimately characterized as favoring one religion over another. The clear intent of the Legislature was to extend a zone of protection to any building used primarily as "a place of assembly by a

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[14/] See United States v. Seeger, 380 U.S. 163 (1965)(interpreting a law limiting military exemptions for conscientious objectors to those who believe in a "Supreme Being"); Washington Ethical Society v. District of Columbia, 249 F. 2d 127, 129 (D.C. Cir. 1957) (Washington Ethical Society's property qualified as a church which was defined in part as a building used for "religious worship").

bona fide religious group." *Grendel's I*, 662 F. 2d at 97, J.S.A. 76A-77A. Since it is open to a constitutional construction, section 16C cannot be invalidated on its face on the basis of Grendel's underinclusiveness claim.[15]

15/ Section 16C is not analogous to the Minnesota statute invalidated in *Larson v. Valente*, 102 S. Ct. 1673 (1982). The fifty-percent rule in that case was expressly designed to "discriminate *among* religions" *id* at 1687, and was enacted "with the explicit intention of including particular religious denominations and excluding others." *Id*. at 1688.

II. GRENDEL'S DUE PROCESS ARGUMENT RELIES ON ARTIFICAL DISTINCTIONS WHICH ARE NOT SUPPORTED BY THIS COURT'S PRECEDENTS.

A. Section 16C Bears A Reasonable Relationship To A Legitimate State Purpose.[16]

Grendel's does not challenge the method by which the Commission has applied the Massachusetts licensing standards to its application.[17]

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[16] By responding to Grendel's due process argument, the appellants do not mean to suggest that the issue is properly before the Court. The _en banc_ panel did not express any view on this issue. Thus, if that panel's decision is reversed, the appropriate remedy would be to remand the case to the _en banc_ panel for consideration of the due process claim. _United States_ v. _Rutherford_, 442 U.S. 544, 559 n. 18 (1979).

[17] Grendel's admonishes the Commission for "derogating" its "interest in this case by resurrecting the long-

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Grendel's assault is instead directed at one legislative standard which must be satisfied in order to engage in the

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discredited 'rights/privilege' distinction" and alleges that "both 'liberty' and 'property' interests are at stake here." Grendel's Brief at 24. Nevertheless, under Massachusetts law, Grendel's has no entitlement to the procurement of a liquor license. See Pronghorn, Inc. v. Licensing Board of Peabody, 13 Mass. App. Ct. 70, 73, 430 N.E. 2d 842, 844-845(1982). See Commission's Brief at 89 n. 77. Unlike the cases cited by Grendel's (Grendel's Brief at 23-24), section 16C neither terminates nor suspends any right or privilege which Grendel's presently enjoys. Compare Perry v. Sindermann, 408 U.S. 593 (1972) (termination of de facto property interest in employment). Nor does §16C infringe upon any valid liberty interest which Grendel's may claim. Compare Wisconsin v. Constantineau, 400 U.S. 433 (1971) (liberty interest in one's reputation). There is simply "no inherent right in a citizen to . . . sell intoxicating liquors. . . ." Crowley v. Christensen, 137 U.S. 86, 91 (1890); Cf. Rice v. Norman Williams Co., 102 S. Ct. 3294, 3302 (1982).

business of selling liquor. In this regard, as Grendel's itself recognizes, its claim is rooted in the doctrine of substantive due process. Grendel's Brief, 23 n. 3. See, e.g., Sandbach v. City of Valdosta, 526 F. 2d 1259, 1261 (5th Cir. 1976)(challenge to ordinance prohibiting liquor sales within 200 feet of a church).

Grendel's nevertheless concedes that the saving secular purpose of §16C is to protect diverse centers of spiritual, educational, and cultural enrichment. Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 766-767, J.S.A. 125A-126A. Since §16C has a legitimate secular purpose, it necessarily promotes the general health, welfare and safety. Section 16C thus demonstrates the minimal rationality required to satisfy the dictates of substantive due process.[18/]

Grendel's further argues that these "legitimate secular goals" could be achieved through different means.

[18/] The amici mistakenly argue that a "heightened scrutiny is required." Amici Brief at 7-8 note. This case, unlike the cases cited by the amici, does not involve a claim which has traditionally required a higher level of scrutiny. See Amici Brief at _id._ citing _Craig_ v. _Boren_, 429 U.S. 190 (1976) (claim of gender-based classification); and _United States_ v. _Lee_, 102 S. Ct. 1051 (1982) (claim involving the denial of Free Excercise liberties). In contrast to those situations, a challenge to a pure economic regulation "traditionally merits only the mildest review under the Fourteenth Amendment." _Craig_, 429 U.S. at 207. _See also_ _Williamson_ v. _Lee Optical Co._, 348 U.S. 483, 488 (1955). This standard of review applies even when such a challenge implicates some Establishment Clause interest. _McGowan_ v. _Maryland_, 366 U.S. 420, 425 (1961).

Grendel's Brief at 7, 35.[19] Legislative enactments are not, however, "unconstitutional simply because the [Legislature] could have selected another means of achieving the desired ends." Clements v. Flashing, 102 S. Ct. 2836, 2846 (1982). While Grendel's may challenge the wisdom of the Legislature's judgment, the "Due Process Clause does not authorize this Court to assess the wisdom of [that] decision." Rice v. Norman Williams, 102 S. Ct. 3294, 3302 (1982); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125 (1978). Viewed in this light, §16C does not violate substantive due process principles.[20]

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[19] Grendel's suggests that the Legislature direct "the responsible public authorities to give due weight to the interests of each such institution, whether sua sponte, or at the institution's behest, in appropriate proceedings." Id. at 35 (emphasis in original).

B. Section 16C Does Not Improperly Delegate Legislative Authority To Churches or Schools.

Grendel's harshest criticism of §16C is that it improperly delegates legislative power to churches and schools. This argument fails because legislative enactments which allow individuals to waive the protection of an otherwise applicable prohibition do not delegate legislative authority. See Commission's Brief at 90-101; see also City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 678 n. 11 (1976); Davis v. Blount County Beer Board, 621 S.W. 2d 149, 151 (Tenn. 1981).[21/] While Grendel's does

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[20] In Massachusetts, liquor licenses are issued solely "to serve the public need" and then, only "in a manner so as to protect the common good." Mass. Gen. Laws, c. 138, §23 (West 1974); Statutory Appendix in Commission's Brief at 5a. Because of the broad inquiry made by licensing officials, the determination of whether a liquor license should be granted is legislative, rather than adjudicative, in nature. Dubois v. Board of Selectman of Dartmouth, 2 Mass. App. Ct. 674, 677, 319 N.E. 2d 735, 737 (1974). Accord, Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 618, 138 N.E. 2d 131, 135 n. 6 (1956). Section 16C thus represents one standard by which the Legislature has determined to measure the common good.

[21/] The objection under §16C has been consistently characterized as a "veto". This characterization is not technically correct, however, since it implies that churches and schools may prevent the implementation of proposed official action. As will be shown infra at 35-39, these institutions hold no such power. Compare Crowley v. Christensen, 137 U.S. 86 (1890), where the Court upheld an ordinance which required a city official who had previously denied a liquor license to issue the license when an applicant obtained the assent of twelve neighboring landowners. See also City of Eastlake, 426 U.S. at 670 (making city council's change in zoning ordinance dependent upon a citywide referendum).

not contest this general proposition (Grendel's Brief at 27), Grendel's nevertheless insists that §16C does not reflect a general prohibition on the issuance of liquor licenses near existing churches and schools. Grendel's Brief at 28. Prompted by the District Court's perception that the 1970 amendment to section 16C "actually reversed the underlying policy of the statute," Grendel's Den, Inc. v. Goodwin, 495 F. Supp. at 764, J.S.A. 120A, Grendel's argues that the Massachusetts Legislature has adopted a policy of "legislative neutrality"[22/] and has surrendered its lawmaking responsibility to churches and schools. Grendel's Brief at 27-28.

[22/] Grendel's Brief at 29 n. 29 [emphasis in original].

Grendel's interpretation of the evolution of §16C lacks any credible foundation.[23] If the Legislature had in fact changed its policy concerning the issuance of liquor licenses near churches and schools, it could have simply repealed the 1968 version of §16C. The 1970 amendment does not reflect a change in legislative policy, but merely refines §16C so that it might better serve the interests of all parties involved. While the amendment shifted to the protected institution the burden of objecting at the appropriate time, the Legislature retained its essential "mandate that no [liquor] license be granted within the protected area in the face of a non-consenting church [or school]." Arno, 384 N.E.2d at 1228, J.S.A. 178A. While Grendel's may challenge the accuracy of the Massachusetts Supreme Judicial Court's review of §16C's legislative history (Grendel's Brief at 28 n. 29), that Court's evaluation, not Grendel's, is controlling. Cf. New York v. Ferber, 102 S. Ct. at 3360, 3361 n. 24. Moreover, Grendel's presentation of the legislative history is not only partisan and highly selective, it is wrong.[24/]

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[23] Judge Campbell of the First Circuit was moved to characterize this argument as "far-fetched." Grendel's I, 662 F.2d at 93, J.S.A. 53A.

[24/] While the 1968 version did omit schools from the waiver provision, Grendel's conspicuously fails to mention that this oversight was quickly corrected by the enactment of chapter 305 of the Acts of 1969. See Statutory Appendix at the end of this Brief, infra at 1a.

(footnote continued)

In any event, Grendel's exclusive focus upon the statutory language is faulty because it elevates form over substance. Its analysis produces the incongruous result that the 1968 version

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(footnote continued)

Furthermore, contrary to Grendel's Brief at 28 n. 29, Mr. Sirianni did not, according to legislative records, file legislation in 1969 concerning §16C. See 1969 Massachusetts House Journal, House Docs. 2480 and 2713. Mr. Sirianni did file a bill in 1970 which was passed and is now the present version of section 16C. Contary to Grendel's assertions, Mr. Sirianni's proposed bill did not treat schools and churches differently. See 1970 Mass. House Journal, House Doc. 3067.

Finally, the words of then Governor Sargent who proposed an amendment to Mr. Sirianni's bill appear particularly relevant. In proposing his amendment, the Governor stated that:

> If the General Court desires to shift the burden to the church or school to object, rather than to prevent the issuance of the license if the church or school does not assent, I have no

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of §16C was constitutional whereas the 1970 version was unconstitutional. See Grendel's Den, Inc. v. Goodwin, 495 F. Supp. at 764-765, J.S.A. 114A-115A.

(footnote continued)

> objection. However, I believe that it is only fair that the church or school, at the time they are given notice of the pending application, also be informed of the fact that they must make this written objection in order to prevent the issuance of the license. The amendment I propose would simply make the parties concerned aware of their rights and responsibilities under the changes incorporated in this legislation.

Governor's Letter, 1970 House Journal, Doc. 5215.

In response, the Legislature added a second section to the proposed bill which amended §15A and, for the first time, required license applicants to give individualized notices to churches and schools advising them that they had the right to object to the issuance of the license. See 1970 Mass. Acts c. 192, §2; Statutory Appendix to Commission's Brief at 9a. Such an amendment hardly reflects legislative indifference.

There is, however, no substantive distinction between the two versions.[25/] Since the ultimate effect of the two versions is the same, "[t]he 1970 amendment created no material distinction for the purpose of analyzing the delegation issue." Arno, 384 N.E.2d at 1228, J.S.A. 177A-178A.

[25/] Under the 1968 version, the license applicant was required to seek out the written assent of the church or school. If the church or school refused to assent in writing or if the applicant was unable to contact the necessary persons within the time required, his application was denied. The rights which the church or school possessed under that version were thus identical to rights which they possess under the current version. Those institutions could object, remain silent, or assent. The only difference between the two statutes is the mechanism by which the objection is recorded. The present §16C simply relieves the applicant of the obligation to obtain the institution's assent.

The more important question which Judge Campbell found to be controlling, "is whether the 'consent' or 'lack of objection' of private parties goes only toward the modification of restrictions that have already been validly framed by representative bodies and that reflect a clear expression of governmental policy." Grendel's I, 662 F.2d at 93, J.S.A. 52. In another context, this Court has similarly observed that:

> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

Hampton v. United States, 276 U.S. 394, 407 (1928), quoting Cincinnati, Wilimington & Zanesville R.R.Co. v. Commissioners, 1 Ohio St. 77, 88 (1852).[26]

Section 16C does not grant to churches or schools the authority to enact laws. When a school or church objects, its objection does not represent the creation of legislative policy, but merely its effectuation.[27]

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[26] Accord, Davis v. Blount County Beer Board, 621 S.W.2d 149, 152 (Tenn. 1981); Huff v. City of Des Moines, 244 Iowa 89, 56 N.W. 54, 58 (1952). This distinction also comports with the general notion that legislative enactments are not unconstitutional simply because their operation is dependent upon the action of private individuals. See Currin v. Wallace, 306 U.S. 1, 15 (1939) (upholding Congressional restriction on regulation of tobacco market "unless two-thirds of the growers" in that market favor it).

[27] Of course, the Legislature could have framed this policy in many different

(footnote continued)

Contrary to Grendel's rhetoric, §16C is not "exactly analogous" to the ordinance in Eubank v. City of Richmond, 226 U.S. 137 (1912). Grendel's Brief at 25. The Eubank ordinance removed all discretion from government officials and compelled those officials to enforce whatever action was taken by the voting property owners. The action of the property owners in Eubank "was not a condition precedent to the establishment of a building line by the city authorities, but

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(footnote continued)

ways. For example, the Legislature could have required the licensing authorities to deny the license application upon a protest by a church or school at a public hearing. See Davis v. Blount County, 621 S.W.2d at 150. While this design would probably satisfy Grendel's objections, it would not enhance any due process interests of the parties involved. Grendel's I, 662 F.2d at 95, J.S.A. 61A-62A.

[rather] established the line." Myers v. Furtunato, 12 Del. Ch. 374, 110 A. 847, 848 (1920). Similarly, in Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), permission for the intended use was not left to government officials. The property owners' action substituted for any official decision and the use became mandatory upon their consent.[28/]

In contrast to the government officials in those cases, both the Commission and the CLC here retain substantial authority to deny a license, even if the

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[28/] The ordinance in Roberge stated that "a philanthropic home for children or for old people shall be permitted, in the First Residence District when the written consent shall have been obtained. . . ." Roberge, 278 U.S. at 118 [emphasis supplied].

protected institution chooses not to object. Arno, 384 N.E.2d at 1227 n. 10, J.S.A. 173A n. 10. Section 16C acts merely as condition precedent to the operation of the licensing process which the Legislature has established.[29/] While the objection necessarily results in the denial of licensure, that effect

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[29/] Although the Commission doubts the relevance of the seventeenth and eighteenth centuries licensing practices of the English Justices of the Peace (Grendel's Brief at 11, 14, 26), the historical perspective does highlight the lack of delegation here. In contrast to the tightly confined action of churches and schools under §16C, the abuses to which Grendel's refers arose from the justices' open-ended "threefold power of selection, power of withdrawal, and power to impose conditions." S. & B. Webb, The History of Liquor Licensing, Principally from 1700 to 1830, Vol. 11 of English Local Government 6, 103 (1903).

is not derived from the action of the protected institution, but is mandated by Legislative enactment itself. The statute does not, therefore, delegate legislative authority to churches or schools.

CONCLUSION

Section 16C provides schools and churches with a zone of protection from the various incompatible activities which accompany the distribution of liquor. The present version of §16C embodies a deliberate legislative accommodation between the interests of these institutions and the interests of potential liquor licensees. Section 16C does not violate the Establishment Clause. It has a legitimate secular purpose and merely extends to churches and schools the benefit of a liquor-free zone in which to carry on their activities. No economic aid is given to religious groups. There is no state sponsorship of religion and no sect is preferred over another. Finally, §16C does not bestow upon these religious and educational institutions any lawmaking authority.

Section 16C merely allows these institutions to maintain the quality of the environment in which their congregations have developed facilities for the pursuit of their various concerns. It does no more than "to create without state involvement an atmosphere in which voluntary religious exercise may flourish." McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring).

The en banc panel failed to give due respect to §16C's underlying zoning purpose. Under its rationale, states are precluded from extending any zoning protection to churches. The Establishment Clause does not, however, require states to ignore the needs of its religious institutions in land-use planning. The *en banc* panel's decision has improperly restricted the state's ability to accommodate the diverse interests of its citizens. The *en banc* panel's decision should therefore be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

1969 Mass. Acts c. 305

AN ACT FURTHER REGULATING THE ISSUANCE OF ALCOHOLIC BEVERAGE LICENSES IN THE PROXIMITY OF SCHOOLS.

Be it enacted, etc., as follows:

Section 16C of chapter 138 of the General Laws is hereby amended by striking out the first paragraph, as most recently amended by chapter 435 of the acts of 1968, and inserting in place thereof the following paragraph:-

Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages; but this provision shall not apply to the transfer of a license from premises located within said distance to other premises located therein, if it is transferred to a location not less remote from the nearest church or school than its former location, nor shall it apply to the licensing of premises located within a radius of five hundred feet of a church or school if the governing body of such church or school assents in writing to such licensing. The term governing body as used in the preceding sentence shall mean the school committee, in the case of a public school.

Approved, May 15, 1969

Appellee's Reply Brief

MOTION FILE
OCT 6 1982

No. 81-878

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JOHN P. LARKIN, *et al.*,
Appellants,
v.
GRENDEL'S DEN, INC.,
Appellee.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL STATEMENT AFTER ARGUMENT, AND SUPPLEMENTAL STATEMENT AFTER ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-878

JOHN P. LARKIN, *et al.*,
Appellants,

v.

GRENDEL'S DEN, INC.,
Appellee.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL STATEMENT AFTER ARGUMENT

Pursuant to Rule 35.6 of the Rules of this Court, appellee respectfully moves for permission to file the attached post-argument statement to address a matter on which the oral argument focused, but which the briefs did not discuss: the propriety of the First Circuit's action in reaching appellee's First Amendment claim without first disposing of appellee's antitrust arguments. *See* J.S.A. 9A.

Respectfully submitted,

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October 6, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-878

JOHN P. LARKIN, *et al.*,

Appellants,

v.

GRENDEL'S DEN, INC.,

Appellee.

SUPPLEMENTAL STATEMENT AFTER ARGUMENT

Appellee respectfully submits this post-argument statement to address a matter on which the oral argument focused, but which the briefs did not discuss: the propriety of the First Circuit's action in reaching appellee's First Amendment claim without first disposing of appellee's antitrust arguments. *See* J.S.A. 9A.

Inasmuch as the sole relief appellee sought was invalidation of the veto of its liquor license pursuant to Mass. G. L. § 16C, the antitrust arguments were, of course, unavailing without proof that the anticompetitive behavior appellee alleged had led the church to invoke its Section 16C veto power *and* that, under the Supremacy Clause, the state and city appellants were thus duty-bound to disregard the church's veto and hence to violate their state-law duty under Section 16C. Like appellee's arguments that the First and Fourteenth Amendments required appellants to disregard that veto, the argument that the Sherman Act imposed a similar obligation thus entailed a federal constitutional override of a state law — and it is not error to bypass a preemption-based override in striking down a state law on other constitutional grounds. *See, e.g., Edgar* v. *Mite*, 102 S.Ct. 2629, 2641-43 (1982); *id.* at 2643 (O'Connor, J., concurring in part).

Moreover, in this case particularly, bypassing the preemption issue and the complex trial it would have entailed, *cf. Rice* v. *Norman Williams Co.*, 102 S.Ct. 3294, 3299 (1982) (*facial* antitrust attack rejected), may well have seemed the sounder course in light of the substantial First Amendment questions — recognized by the First Circuit in a cognate context after appellee had filed its complaint, *see Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) (detailed inquiry into parochial school's financial affairs constrained by anti-entanglement principles) — that would arise during the probe into church motives and internal decisions necessary to a full-blown trial of the antitrust attack on state enforcement of the church's veto. Indeed, it must have become obvious by the time of the ruling below, if not earlier, that appellee could well feel compelled to forego pressing its antitrust allegations to trial at all in light of the high cost and delay already incurred by appellee in this litigation.

Appellee's principal challenge to Section 16C, both on its face and as applied on the stipulated facts of this case, is thus fully ripe for resolution by this Court on the record now before it.

Respectfully submitted,

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October 6, 1982

Amicus Brief

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No. 81-878.

In the
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OCTOBER TERM, 1981.

JOHN P. LARKIN, ET AL.,
Appellants,
v.
GRENDEL'S DEN, INC.,
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ON APPEAL FROM AN *en banc* JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS.

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NO. 81-878
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN P. LARKIN, ET AL

Appellants,

v.

GRENDEL'S DEN, INC.,

Appellee.

ON APPEAL FROM AN EN BANC JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION and CIVIL LIBERTIES UNION OF MASSACHUSETTS

Interest of Amici Curiae

The American Civil Liberties Union (ACLU) is a non-profit organization with 250,000 members nationwide. For over 60 years, it has devoted itself to the protection of individual rights against government incursion. The Civil Liberties Union of Massachusetts (CLUM) is a state affiliate of the ACLU.

Both ACLU and CLUM have been actively involved in the legal defense of First Amendment religious liberties. In recent cases, ACLU represented the plaintiff in Wolman v. Walter, 433 U.S. 229 (1977) and submitted a brief as amicus curiae in Thomas v. Review Board, 450 U.S. 707 (1981). CLUM submitted a brief as amicus curiae in this action in the United States Court of Appeals for the First Circuit.

Amici believe that this case raises an important issue of religious liberty, namely, whether the establishment clause of the First Amendment permits a state to delegate to church officials the power to approve the issuance or transfer of a liquor license. Amici support the position of the appellee that such a delegation is contrary to the principles of separation of church and state that are at the core of the First Amendment.

Summary of Argument

The statute challenged by Grendel's Den, Massachusetts General Laws chapter 138, § 16C, fails all three parts of the constitutional test for violations of the establishment clause. It does not have a legitimate secular purpose because it explicitly transfers civil regulatory power to churches "dedicated to divine worship." Its principal and primary effect is to aid and advance religion by giving these churches power over the livelihoods of commercial establishments in their neighborhoods. And it threatens excessive government entanglement with religion because inquiries and procedures necessary to prevent arbitrary, discriminatory, or religiously-motivated decisions by the churches would enmesh secular authorities in religious affairs.

Argument

I. THE STATUTE DOES NOT HAVE A SECULAR LEGISLATIVE PURPOSE.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court drew together and summarized "the cumulative criteria" that it had developed over the years for assessing whether challenged governmental actions offend the establishment clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ...; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13, quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970). Section 16C fails to satisfy any of these three criteria.

Amici do not accept the proposition, unquestioned by the appellee, that section 16C has a secular purpose. See Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 766-67 (D. Mass. 1980), J.S.A. 125A-126A. The state asserts that the statute has the secular purpose of "protecting diverse cultural, educational and spiritual centers from the disturbances associated with liquor distribution and consumption." State Br. 19. The flaw in this contention is that the statute does not protect diverse activities. The statutory protection is quite narrow, limited to schools and churches. In this respect it differs from inclusive statutes with legitimate secular purposes that incidentally aid religion along with other worthy endeavors. E.g. Walz v. Tax Commission, 397 U.S. at 672-73; McGowan v. Maryland, 366 U.S. 420, 444-45 (1961).

Nor can section 16C be thought to embody a legitimate secular purpose of prohibiting liquor consumption near churches and schools, the original legislative policy of a predecessor statute. See 1954 Mass. Acts, c. 569, § 1, reprinted at State Br. 6a. Contrary to the Attorney General's contention, State Br. 18, 35-38, the present section 16C is not a continuation, in less rigid form, of the arguably secular policy behind the original statute; it is instead a near-reversal of that policy. Rather than banning liquor consumption within 500 feet of a school or church, Massachusetts now permits it, except if a school or church governing board affirmatively objects. At the very least, the legislative policy is now neutral, as the district court found. Grendel's Den, Inc. v. Goodwin, 495 F.Supp. at 765, J.S.A. 115A-117A. The Statement of Agreed Facts reveals that as of September 1979 there were 26 liquor licensees located within 500 feet of Holy Cross Armenian Church (J.A. 67-72) -- hardly a demonstration of a state policy against mixing alcohol with education or religion.

Similarly, the legitimate secular functions of regulating land use or sale of alcohol, which the Attorney General goes to some length to describe, State Br. 25-40,* are not reflected in section

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*The state is wrong when it argues that a deferential standard of judicial review is appropriate in this case because its power to regulate liquor consumption is implicated. State Br. 40-45. Where constitutional guarantees are infringed by exercise of any state power, including the regulatory power over

16C because that statute does not regulate land use or liquor sales in any coherent fashion. The benefit conferred by section 16C differs from benefits that may accrue to a church from zoning regulation that by its nature must take into account religious use of land. See Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle, 81 Harv.L. Rev. 513, 538 (1968). The sole function of section 16C, by contrast, is to set

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Footnote from page 7 continued.

liquor, heightened scrutiny is required. Craig v. Boren, 429 U.S. 190, 206-209 (1976). To justify an infringement of the religion clauses, the state must show that the infringement is "essential to accomplish an overriding governmental interest." United States v. Lee, ____ U.S. _____, 50 U.S.L.W. 4201, 4203 (Feb. 23, 1982). This case does not involve simply a "time, place, and manner" restriction on First Amendment rights, see California v. LaRue, 409 U.S. 109, 115-18 (1972); id at 119-20 (Stewart J., concurring), but a total delegation of secular power to churches.

up a particular procedural scheme by which selected organizations may impose their will upon license applicants and upon the governmental process generally. If regulation of land use or liquor consumption sufficed as a secular purpose for this wholesale statutory grant of power, then by the same reasoning transfer of state judicial power to ecclesiastical courts could be said to have the secular purpose of promoting justice.

Section 16C lacks a legitimate secular purpose because it explicitly grants to churches regulatory power that it withholds from almost all other private institutions; it "uses religious means to serve secular ends where secular means would suffice." Abington School District v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, Jr., concurring). In Schempp, the Court saw through claims of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature," id. at 223; it refused to ignore the obvious religious character of Bible readings. Similarly, last term in Stone v. Graham, 449 U.S. 39 (1980) (per curiam), the Court was not deluded by avowed secular purposes behind Kentucky's requirement that the Ten Commandments be posted in every public school: "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Id. at 41.

The establishment in the present case of an explicit "working arrangement" between churches and the state, Schempp, 374 U.S. at 227 (Douglas, J., concurring), is likewise "plainly religious in nature," and precludes a finding of secular purpose, for none of the legitimate purposes advanced by the state explains or justifies its outright transfer of secular authority to churches. As the Court noted in Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church, 393 U.S. 440, 451 (1969), the First Amendment simply prohibits states from employing religious organizations as an arm of civil government "to perform the function of interpreting and applying state standards."

II. A PRINCIPAL OR PRIMARY EFFECT OF SECTION 16C IS TO ADVANCE RELIGION.

A. The Statute Directly Grants Secular Power to Ecclesiastical Bodies.

The Court of Appeals held that section 16C fails the principal or primary effect test because it "confers upon churches a valued benefit or power," Grendel's Den, Inc. v. Goodwin, 662 F.2d 102, 104 (1981), J.S.A. 11A, that is "substantial," especially considering that the power is absolute and "may threaten the viability" of license applicants subject to it. Id. at 105, J.S.A. 13A. The Court noted, "the establishment clause's strictures are not confined to the context of cash supports to religion." Id. at 104, J.S.A. 12A.

The Attorney General appears to argue that section 16C is simply a zoning statute, with the obvious secular effect of promoting tranquility and conforming land uses. State Br. 58-63. He further urges this Court to believe that the effect of advancing religion is only "de minimis" or "incidental," and not principal or primary. Id., 54-56.

The Attorney General misapprehends the meaning and substance of the religious effects test. It is not enough for the state to point to some secular effect; the statute must have no principal or primary effect that advances religion. It is not the law that finding an arguably secular single "primary" effect ends analysis in favor of the challenged statute. On the contrary,

> Such metaphysical judgments are [not] possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.

Committee for Public Education v. Nyquist, 413 U.S. 756, 783-84 n. 39 (1973).*

For example, in Tilton v. Richardson, 403 U.S. 672 (1971), construction grants to religiously-affiliated colleges (but not seminaries) for buildings to be used for wholly secular purposes were held not to have a principal or primary effect of advancing religion. But even there, the possibility that after 20 years a building might be converted to religious use was enough to invalidate that 20-year limitation, for otherwise the original grant could "in part have the effect of advancing religion." Id. at 683. Similarly, in Wolman v. Walter, 433 U.S. 229 (1977), some types of state aid to parochial schools, those truly "incapable of diversion to religious use," id. at 248, were upheld, but others were invalidated because, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. at 250. The relevant inquiry is whether "it can be shown with a high degree of certainty that the aid will have only secular value." Committee for Public Education v. Regan, 444 U.S. 646, 653 (1980) (emphasis added).

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*See also Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle, 81 Harv. L. Rev. 513, 533-34 (1968) (there may be multiple primary, chief, or fundamental effects).

In the present case, there can be no such certainty, for state power flows directly to ecclesiastical bodies. It is not possible to confine that power to secular areas, as, for example, state aid was confined in Regan, or to prevent "diversion" of the power to "religious use," as in Wolman, since by its terms the power is already diverted to religious use. Thus, this is not an "incidental" or "indirect" benefit to religion, and it is surely not "remote." See Committee for Public Education v. Nyquist, 413 U.S. at 771-72, 782-83. It is instead a direct transfer of the power and prestige of government to given religions, Engel v. Vitale, 370 U.S. 421, 431 (1962), a prohibited fusion of the "functions of Government and of religious sects." McCollum v. Board of Education, 333 U.S. 203, 227 (1948) (Frankfurter, Jackson, Rutledge, and Burton, JJ., concurring).

Justice Brennan pointed out the precise nature of the danger of investing church bodies with such power or prestige in his concurrence in Abington School District v. Schempp, 374 U.S. 203 (1963). Explaining the difference between McCollum, which struck down religious "released time" instruction on public school property, and Zorach v. Clauson, 343 U.S. 306 (1952), which upheld released time away from the public school, Justice Brennan observed that it was not at all the incremental cost to the public fisc that distinguished the setup in McCollum from that in Zorach:

> The deeper difference was that the McCollum program placed the religious instructor in the public school classroom in precisely the position of authority held by regular teachers of secular subjects, while the Zorach program did not. The McCollum program, in lending to the support of sectarian education all the authority of the governmentally operated public school system, brought government and religion

> into that proximity which the Establishment Clause forbids.... [T]he Constitution does not permit that prestige and capacity for influence [that religious teachers presumably have] to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

Schempp, 374 U.S. at 262-63. The point is clear: where power and authority, even symbolically, are involved, the state may not "augment" ecclesiastical influence. A fortiori, where tangible power, not only symbolism, is transferred, the principal or primary effect is plainly to advance religion.

B. The Statute Encourages Financial Support of Certain Churches, Discrimination in Favor of Their Adherents, and Injection of Religious Doctrine Into Secular Regulatory Decisions.

Although Grendel's challenges the law on its face, this Court need not ignore section 16C's obvious potential for fostering both financial aid to religion, and religious discrimination. The First Circuit noted the possibility that "a church and its neighbors may bargain over the sale of such an indulgence" as a liquor license, 662 F.2d at 104, J.S.A. 12A; even without explicit bargaining, it is not difficult to see that the statute encourages aspiring licensees to make financial contributions to their ecclesiastical neighbors in a prudent effort to discourage vetoes.* That such direct financial aid to religion has not been proven in the context of the present facial challenge to the law does not mean that its likelihood should be ignored. This Court has frequently, in establishment clause cases, analyzed the probable effects of a statutory scheme. E.g., Meek v. Pittenger, 421 U.S. 349, 369-71 (1975) ("danger that religious doctrine will become intertwined with secular instruction"); Lemon v. Kurtzman, 403 U.S. at 617-20 ("potential for impermissible fostering of religion"); Tilton v. Richardson, 403 U.S. at 683 (possibility that after 20 years building could be converted to religious use).

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*This is not a case like Walz v. Tax Commission, 397 U.S. 664 (1970), whose reasoning would uphold governmental action that arguably encourages voluntary private gifts to churches, that extends broadly to many charitable organizations, and that provides no opportunity for particular churches to pressure individuals to contribute, irrespective of their religious affiliations or beliefs.

The second possible effect is religious discrimination. It does not take much imagination to foresee that church governing bodies would be tempted to favor members of their own faith, either as license applicants or as already-licensed competitors of applicants.

Such discrimination on the basis of religious belief or affiliation in the distribution of a government benefit by a body vested with governmental authority would clearly violate both the establishment and free exercise clauses. E.g., Thomas v. Review Board, 450 U.S. 707 (1981); Torcaso v. Watkins, 367 U.S. 488 (1961); Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

Section 16C also makes it possible for a church body's religious beliefs to affect its decisionmaking. In the first of the two decisions below, the Court of Appeals acknowledged that a church might well look to the "conscientiousness" of a license applicant. 662 F.2d 88, 94 (1981), J.S.A. 60A. But where conscientiousness ends and piety begins is difficult to say. Certainly a church whose doctrine condemned consumption of alcohol would be hard put to divorce this religious belief from its licensing decision. Such substitution of sectarian for secular policy standards, without even a provision for review, surely has the effect of advancing the religions whose beliefs are reflected in the licensing choices. Cf. Epperson v. Arkansas, 393 U.S. 97 (1968); Engel v. Vitale, 370 U.S. 421 (1962). Given this likelihood that license decisions may be religiously-tinged, the appellants' fond hopes that ecclesiastical bodies will exercise good faith -- which in this particular context means purging their decisions of any religious element -- are unrealistic, and in any event could not salvage the statutory scheme, any more than the possibility of good faith on the part of teachers in Lemon, Nyquist, or Meek could validate the programs of parochial school aid in those cases.

It is sometimes forgotten that the establishment clause is a protection as much for religion as for secular democratic society. Its "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Engel v. Vitale, 370 U.S. at 431. Fusing religious and civil power creates "precisely those dangers - as much to church as to State - which the Framers feared would subvert religious liberty and the strength of a system of secular government." Schempp, 347 U.S. at 295 (Brennan, J., concurring) (emphasis added). This danger to religion is evident in the present case, for a church's unreviewable exercise of liquor licensing power, its ability to impose its beliefs or favor its own adherents, and its opportunity to extract contributions from license applicants, all threaten to compromise its integrity -- to "degrade religion."

C. By Singling Out Churches Dedicated to Divine Worship, Section 16C Discriminates in Favor of Theistic Religions and Against Nontheistic and Other Charitable Organizations.

Under the Massachusetts licensing scheme, interested persons or organizations can object to the issuance of a liquor license, in accordance with legitimate secular licensing goals; but only schools and churches dedicated to divine worship have an absolute veto.*

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*Section 12 of chapter 138 permits the local licensing board to refuse a license where the character of the neighborhood requires it; section 15A provides for public notice of applications and a hearing process, and also requires particular notice to all abutters, as well as schools, churches, or hospitals located within 500 feet.

As even the Attorney General admits, "a statute which benefits only religious institutions is more likely to advance religion than is a statute which benefits religious institutions along with many secular institutions." State Br. 66. The First Circuit en banc panel concluded:

> section 16C's language at the very least distinguishes between religious and nonreligious groups by granting significant rights to the former that it withholds from the latter.

662 F.2d at 105, J.S.A. 17A.

This explicit discrimination in favor of religion distinguishes section 16C from inclusive statutes that benefit a broad range of charities, including churches. Id. at 105 n. 8; Walz v. Tax Commission, 397 U.S. at 672-73. As the Court noted in Widmar v. Vincent, ______ U.S.______, 50 U.S.L.W. 4062, 4065 (Dec. 8, 1981), provision of benefits to a broad spectrum of beneficiaries "is an important index of secular effect." Having chosen to give a power or benefit, the state "cannot draw the line between theistic or nontheistic beliefs on the one hand and secular beliefs on the other. Any such distinctions are not... compatible with the Establishment Clause..." Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

The limitation of the benefit in this case to religions dedicated to divine worship underscores the difficulty. As the appellee's brief, at 17 n. 13, points out, common definitions of divine refer to God. Yet it cannot be contended at this point in the process of constitutionally defining religion that discrimination in favor of theistic faiths is tolerable under the First Amendment. See Torcaso v. Watkins, 367 U.S. at 495; Fowler v. Rhode Island, 345 U.S. 57, 70

(1953); Everson v. Board of Education, 330 U.S. at 15. Cf. United States v. Seeger, 380 U.S. 163, 165-66, 174-76 (1965). Regardless of whether, in an appropriate case, a generous reading of section 16C might save it from this particular infirmity, the focus on churches dedicated to divine worship, to the exclusion of all other religious and charitable entities with the sole exception of schools, sharpens and clarifies the statute's principal or primary effect of advancing religion.

III. SECTION 16C FOSTERS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

The absolute and apparently unreviewable power given churches by section 16C appears at first blush to avoid "excessive entanglement" problems simply by failing to provide for any surveillance or review of the churches' decisions. The Attorney General in fact argues that this apparent absence of provision for "administrative assessment of a church's concerns" minimizes entanglement problems. State Br. 85.

But the state cannot insulate itself from constitutional due process and equal protection standards merely by delegating its secular functions to private bodies. As the Court said in Washington ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-22 (1928), such an unreviewable delegation of governmental power possesses a potential for arbitrary and capricious action "repugnant to the due process clause." Ultimate responsibility for the licensing decision remains with the state administrative board, and arbitrary, capricious or discriminatory state action cannot be wholly immune from legal challenge.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974).

The Attorney General in fact concedes that the power given to churches cannot be immune from review. On the very page of his brief in which he claims that absence of provision for "administrative assessment" avoids entanglement, he asserts that the Commission "could reject or ignore any objection under § 16C which was made for discriminatory or otherwise illegal reasons." State Br. 85 n. 74.* Yet this necessary process of review would invariably lead to excessive entanglement.

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*The state Supreme Judicial Court appeared to avoid the due process and equal protection questions, noting only that a hearing is available under the statute to determine whether the objecting institution qualifies as a church, is located within 500 feet of the license applicant, and filed an objection by its governing body. Arno v. Alcoholic Beverages Control Commission, 377 Mass. 83, 90 (1979), J.S.A. 179A-180A.

The present litigation highlights the point. Grendel's amended complaint charged that the church's veto was motivated both by religious discrimination and by the commercial interests of its members, J.A. 16, ¶ 12; and the state appellants' answers to Grendel's interrogatories revealed that section 16C permitted a church to bar issuance of a liquor license on any ground, including religious or racial bigotry, failure to furnish a suitable religious "donation," or pay-off by a competitor of the applicant. J.A. 32-37. The point is not whether or not the Holy Cross Armenian Church is guilty of any of these sins. The point is that some forum for investigating these issues is constitutionally required, yet the process of investigation would entangle the Alcoholic Beverages Control Commission and the civil courts in the innermost policy decisions of religious bodies.

Some surveillance of the church's decision would also be essential under the section 16C scheme to prevent or minimize the danger of advancing religion. In Lemon, 403 U.S. at 618-19, state financial contributions to parochial school teachers' salaries were held to violate the establishment clause in part because of the excessive entanglement that would accrue from state efforts to assure that the teachers were not mixing religious with secular instruction. Similarly in this case government authorities would have to inquire into the decisionmaking processes of ecclesiastical bodies to ensure that their liquor licensing choices were not based either on religious doctrine or on discrimination against applicants of rival faiths.

Such attempts to police the inner workings of churches would run afoul of both the free exercise and establishment clauses. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary E.B. Hull Mem. Prebysterian Church, 393 U.S. at 449.

The Court has occasionally noted that its entanglement and effects tests intertwine in this way. In the parochial school aid cases, the very surveillance necessary to prevent an effect of advancing religion sometimes collides with the proscription against excessive entanglement. E.g., Roemer v. Maryland Public Works Board, 426 U.S. 736, 754 (1976) (attempts to prevent state-funded remedial teachers and counselors from allowing religion "to seep into their instruction" "would excessively entangle the State in church affairs"); Meek v. Pittenger, 421 U.S. at 371 ("need for continuing surveillance" excessively entangles secular authority in church matters). Cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-04 (1979). The detailed inquiry, whether by executive agencies or courts or both, that would be necessary even to attempt to salvage section 16C from its principal effect of advancing religion is precisely the type of entanglement that the establishment clause, and the free exercise clause, forbid.

CONCLUSION

In Wolman v. Walter, 433 U.S. 229 (1977), this Court upheld in part and struck down in part various forms of state assistance to religious schools. Justice Powell, in a separate opinion, observed

> [a]t this point in the 20th century, we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights.

Id. at 263 (concurring in part and dissenting in part). Chief among those dangers, he said, had been "significant religious or denominational control over our democratic processes." Id. But in Massachusetts, under section 16C, certain churches have not just "significant" but complete control over the properly secular democratic procedures for deciding who gets liquor licenses. Such a statutory scheme has no legitimate secular purpose, has a principal or primary effect that advances religion, and threatens excessively to entangle the government with religion. The judgment of the en banc panel of the United States Court of Appeals for the

First Circuit should therefore be affirmed.

Respectfully submitted,

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April 23, 1982

Docket Sheet

NO. 81-878-AFX

TITLE John P. LARKIN, et al., Appellants
v.
Grendel's Den, Inc.

DOCKETED Nov. 12, 1981

COURT United States Court of Appeals for the First Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: Paul W. Johnson, David B. O'Connor
	Counsel for Appellee: Laurence H. Tribe,
Oct. 20, 1981	Application for an extension of time to docket an appeal and order granting same until November 13, 1981 by Brennan, J, October 20, 1981
Nov. 12, 1981	Statement as to jurisdiction filed. (Record filed)
Nov. 12, 1981	Appendix filed.
Dec. 14, 1981	Motion to affirm filed.
Dec. 16, 1981	DISTRIBUTED. 1-8.
Jan. 4, 1982	Reply brief for the appellant filed. (D).
Jan. 11, 1982	Probable jurisdiction NOTED.

Feb. 23, 1982	Order extending time to file the state appellant's brief on the merits until March 3, 1982.
Feb. 26, 1982	Brief for appellant, Cambridge License Commission filed.
Mar. 8, 1982	Joint appendix filed.
Mar. 8, 1982	Brief for the States Appellants filed.
Mar. 25, 1982	Motion of Paul W. Johnson, Esquire, to permit Gerald J. Caruso, Esquire, to argue pro hac vice filed.
Apr. 1, 1982	Order extending time to file the appellee's brief on the merits until Apr. 23, 1982.
Apr. 5, 1982	The motion of Paul W. Johnson, Esquire, to permit Gerald J. Caruso, Esquire, to present oral argument pro hac vice is GRANTED.
Apr. 14, 1982	Brief for the appellee filed.
Apr. 26, 1982	Brief, amici curiae, of American Civil Liberties Union, et al filed.
July 13, 1982	CIRCULATED.
Sept. 27, 1982	Reply brief for the appellants filed. (D).
Oct. 4, 1982	ARGUED.
Oct. 6, 1982	Motion of appellee for leave to file supplemental statement after argument filed.
Oct. 12, 1982	DISTRIBUTED. 10-15. (Above motion).
Oct. 18, 1982	The motion of appellee for leave to file supplemental statement after argument is granted.